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Kaplan v. City of New York

United States District Court for the Southern District of New York

March 22, 2018, Decided; March 22, 2018, Filed

No. 14 Civ. 4945 (RJS)

Reporter
2018 U.S. Dist. LEXIS 68924 *

PETER KAPLAN, Plaintiff, VERSUS CITY OF NEW YORK, et al., Defendants.

Prior History: *Kaplan v. Karambelas, 2017 N.Y. Misc. LEXIS 1569 (N.Y. Sup. Ct., Apr. 25, 2017)*

Counsel: **[*1]** For Plaintiff: John F. Schutty, III, Law Office of John F. Schutty, East Chester, NY.

For Defendants: Ashley R. Garman, Alan H. Scheiner, and Jeffrey Loperfido of the New York City Law Department, New York, NY.

Judges: RICHARD J. SULLIVAN, United States District Judge.

Opinion by: RICHARD J. SULLIVAN

Opinion

MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge:

Plaintiff Peter Kaplan brings this action against the City of New York, Police Officer Marcos Martinez, and various John and Jane Doe Defendants, asserting claims pursuant to Title *42 U.S.C. Sections 1983* and *1988* and Article I, Sections 1, 5, 6, 9, and 11 of the Constitution of the State of New York. Now before the Court is Defendants' motion for summary judgment. For the reasons stated below, Defendants' motion for summary judgment is GRANTED.

I. BACKGROUND

A. Facts

On July 8, 2013, Peter Kaplan was a 54-year-old psychiatrist living with his then-wife, A.K., in an apartment in Manhattan.[1] (Doc. No. 150 ("Def. 56.1") ¶ 1.) Early that day, A.K. went to the 19th Precinct police station and reported that she had gotten into a verbal dispute with Plaintiff, that Plaintiff had threatened to kill her during the argument, that Plaintiff had access to guns, and that she feared for her safety. (*Id.* ¶¶ 2-3.) **[*2]** She also reported that on earlier occasions, Plaintiff had hit and choked her, and had threatened that if she went to the police he would kill her. (*Id.* ¶ 4). A.K. further told the police that Plaintiff had become "crazy and violent," and his threats scarier and more violent, after he started taking Adderall. (*Id.* ¶ 4.) A gun license search performed at the 19th Precinct confirmed that Plaintiff had a number of firearms registered to him. (*Id.* ¶ 5.)

That evening, Defendant Police Officer Marcos Martinez, along with other officers, went to Plaintiff's apartment to investigate A.K.'s report. (*Id.* ¶ 6; *see also* Doc. No. 152-5 at 23:3-25.) When the officers knocked on the door, Plaintiff answered wearing boxer shorts. (Def. 56.1 ¶¶ 6,7.) The offices then escorted Plaintiff to his room to put on additional clothes. (*Id.* ¶ 10.) Plaintiff left his watch, keys, and wallet in the bedroom, was handcuffed, and was taken from the bedroom into the hall. (*Id.* ¶¶ 10-13.). According to Plaintiff, the officers

[1] The following facts are taken from the parties' *Local Civil Rule 56.1* Statements, the affidavits and declarations submitted in connection with the instant motion, and the exhibits attached thereto. Unless otherwise noted, where one party's 56.1 Statement is cited, the other party does not dispute the fact asserted, has offered no admissible evidence to refute that fact, or merely objects to inferences drawn from that fact. In deciding this motion, the Court also considered Defendants' memorandum of law in support of its motion (Doc. No. 151 ("Mem.")), Plaintiffs memorandum of law in opposition to the motion (Doc. No. 161 ("Opp'n")), and Defendants' reply brief (Doc. No. 172 ("Reply")), as well as the declarations and materials submitted in support of those memoranda.

said they would "voucher" his watch, keys, and wallet. (Doc. No. 157 ("Kaplan Decl.") ¶ 7.)

Plaintiff was then handcuffed with his arms behind his back and was transported to the 19th Precinct **[*3]** in a police car. (Def. 56.1 ¶¶ 13-16.) In the police car, the handcuffs cut into Plaintiff's right wrist, causing it to bleed. (*Id.* ¶ 17.) At some point prior to arriving at the 19th Precinct, Plaintiff told Officer Martinez that he had a prior injury to his right wrist and that the handcuffs were cutting into that wrist; he also asked Martinez to loosen the handcuffs. (Kaplan Decl. ¶ 11; *see also* Doc. No. 152-3 ("Kaplan Dep.") 27:23-28:1.) Martinez ignored his request. (Def. 56.1 ¶¶ 19-20.) Instead, on the way to the precinct, Officer Martinez warned Plaintiff that if he moved, the handcuffs would become tighter. (*Id.* ¶ 19; *see also* Doc. No. 162 ("Pl.. 56.1") ¶ 134.) Plaintiff testified in his deposition that he asked Officer Martinez and others "multiple times" to loosen his handcuffs, but that they were hot loosened "for a few hours." (Kaplan Dep. 56:16-20.) When he arrived at the 19th Precinct, Plaintiff was placed in a holding cell. (Def. 56.1 ¶ 21-22.) Eventually, an unidentified police officer removed the handcuffs so Plaintiff could use the restroom and then put them back on more loosely, making them more comfortable. (Pl. 56.1 ¶ 137.)

Plaintiff remained in the 19th Precinct **[*4]** until the next morning, when he was transported to Central Booking, where he was later arraigned on charges of criminal possession of a weapon in the fourth degree, attempted assault in the third degree, and harassment in the second degree. (Def. 56.1 ¶ 27-28.) Although bail was set, Plaintiff was remanded to the custody of the New York City Department of Corrections until all bail conditions were met. (*Id.* ¶ 29.) After arriving at the Manhattan Detention Center ("MDC") intake area at approximately 12:31 a.m. on July 10, 2013 (*id.* ¶ 31), Plaintiff requested that he be placed in protective custody several times because "there were people smoking marijuana," "there was some fighting," Plaintiff "was by far one of the older people there and ... the only white face," and he was "referred to in derogatory terms" (*id.* ¶¶ 64-65), but his requests were rejected or ignored (Pl.. 56.1 ¶ 148). Plaintiff alleges that he was "pushed around, threatened, struck and bruised" by inmates and that his shirt was stolen during his incarceration in the MDC. (Pl. 56.1 ¶¶ 145-16.)

On the evening of July 10, Plaintiff's bail was posted and, while his bail paperwork was being processed, Plaintiff was placed **[*5]** in a holding cell with three other inmates. (*Id.* ¶¶ 154-155; Def. 56.1 ¶ 71.) Plaintiff alleges that he was raped by one of the other inmates during his time in the holding cell, and that despite his screams for help, no guard came to his aid. (Pl. 56.1 ¶¶ 155-156; *see also* Def. 56.1 ¶¶ 72-73.) Plaintiff further alleges that, after the rape, he reported the attack to a guard who was walking by his cell, who responded by saying "shut up or I will put you in with ten fags." (Pl. 56.1 ¶¶ 157-158; *see also* Def. 56.1 ¶¶ 74-76.) Plaintiff was transferred to a new cell, but remained in custody for another two-and-a-half to three hours before he was discharged. (Def. 56.1 ¶¶ 76-77.) When Plaintiff was released from custody, he was given an envelope containing his wallet and keys, but not his watch. (*Id.* ¶ 89.)

B. Procedural History

Plaintiff commenced this action on July 1, 2014 by filing a complaint against the City of New York (the "City"), Police Officer Marcos Martinez, Assistant District Attorney Michael Frantel, and "various John/Jane Does," alleging false arrest, false imprisonment, malicious prosecution, infliction of emotional distress, assault, battery, and violations of several articles **[*6]** of the United States and New York State constitutions. (Doc. No. 1.) On July 31, 2014, Plaintiff filed an amended complaint against the same parties containing the same claims. (Doc. No. 6.) On September 4, 2014, the Court granted the City's motion to stay this proceeding pending resolution of the criminal prosecution then pending against Plaintiff. (Doc. No. 11.)

On June 26, 2015, after Plaintiff was acquitted of the criminal charges against him, the Court lifted the stay and ordered Defendants to answer or otherwise respond to the amended complaint. (Doc. No. 24.) On July 14, 2015, the Court granted Plaintiff's request to file a second amended complaint (Doc. No. 26), which Plaintiff filed on August 8, 2015, adding Defendant Police Officer Edward Raniola and claims for excessive force, failure to protect against assault, and negligence (Doc. No. 27). On September 21, 2015, Defendants Martinez and the City answered the second amended complaint (Doc. No. 33), and the following day, Defendant Frantel submitted a letter indicating his intent to file a motion to dismiss the second amended complaint on various grounds, including *Eleventh Amendment* immunity grounds (Doc. No. 35). In violation of the Court's **[*7]** Individual Rule 2.A, Plaintiff failed to respond to Frantel's letter. (*See* Doc. Nos. 37, 38.)

After granting several adjournment requests (*see* Doc.

Nos. 40-3), the Court held an initial and pre-motion conference on October 16, 2015 at which it also granted Plaintiffs request to file a third amended complaint (*see* Doc. No. 54 8:20-23; 9:20-22). That same day, the Court endorsed the parties' proposed case management plan, which set March 2, 2016 as the deadline to complete fact discovery and April 18, 2016 as the deadline to complete all other discovery. (Doc. No. 45.) Plaintiff filed his third amended complaint on November 9, 2015, adding a claim for conversion (Doc. No. 50), which Defendants Martinez, Raniola, and the City answered on November 18, 2015 (Doc. No. 53) and which Defendant Frantel moved to dismiss on December 7, 2015 (Doc. Nos. 56-58). Despite having vehemently argued at the October 16 initial conference that his claims against Frantel had merit (Doc. No. 54 at 4:23-9:2), Plaintiff voluntarily dismissed the claims against Frantel on December 18, 2015 (*see* Doc. No. 59).

On January 13, 2016, the Court granted Plaintiff leave to file a fourth amended complaint eliminating Defendants **[*8]** Frantel and Raniola. (Doc. No. 65.) On February 12, the parties requested that the deadline to complete fact discovery be extended from March 2, 2016 until June 2, 2016, which the Court denied. (Doc. Nos. 66-67.) The Court also ordered Plaintiff to promptly file his fourth amended complaint, which he had neglected to do during the month following the Court's January 13 Order. (*See* Doc. No. 67.) On February 17, 2016, Plaintiff filed his fourth amended complaint, which removed Frantel and Raniola as defendants and eliminated the claims for false arrest, false imprisonment, malicious prosecution, and infliction of emotional distress. (Doc. No. 70.)

On February 19, 2016, Plaintiff submitted a letter describing a discovery dispute primarily regarding the identity of corrections officers working at the MDC on the night of July 13, 2013 and again requesting an extension of the discovery deadline. (Doc. No. 73.) Noting that Plaintiffs letter violated the Court's Individual Rule 2.G, which requires the parties to first confer and then submit a *joint* letter describing the discovery dispute, the Court nonetheless ordered Defendants to respond to Plaintiff's allegations (Doc. No. 74), which they did on **[*9]** February 24, 2016, (Doc. No. 76). That same day, the parties also submitted a joint letter describing *another* discovery dispute regarding certain depositions sought by Plaintiff. (Doc. No. 75.) On February 25, 2016, the Court issued an order adjourning the deadline to complete fact discovery until March 25, 2016, noting that "[no] additional extension requests will be granted absent compelling and unforeseen circumstances" and warning the parties "to plan discovery accordingly." (Doc. No. 77.)

Disappointingly, one week before the expiration of the newly extended deadline for fact discovery, the parties submitted a joint letter — which exceeded the length permitted in the Court's Individual Rule 2.G — describing additional discovery disputes and *again* requesting an extension of the deadline to complete fact discovery. (Doc. No. 79.) In the letter, Plaintiff also requested, for the first time, discovery pursuant to *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*, even though Plaintiff had neglected to raise any issue with respect to such discovery in any of its prior submissions, including the parties' joint February 12 letter, Plaintiffs unilateral February 19 letter, and the parties' joint February 24 letter. (*Id.* at 7.) On March 23, 2016, the **[*10]** Court granted most of Plaintiffs requests and ordered Defendants to produce a *Rule 30(b)(6)* witness for a deposition by the close of discovery; identify the corrections officers on duty and the three prisoners in Plaintiff's cell on July 10, 2013; produce certain logbooks; and grant Plaintiff access to various items of evidence in Defendants' possession. (*See* Doc. No. 86.) However, because the Court's prior extensions were granted for the limited purposes identified in the parties' joint February 24 letter, and because the circumstances of Plaintiffs late-breaking request for *Monell* discovery were neither compelling nor unforeseen as required by the Court's February 25 Order, the Court denied that request. (*Id.*)

On May 6, 2016, the Court held a post-discovery conference to discuss Defendants' contemplated motion for summary judgment. Instead of setting a briefing schedule for the motion, however, the Court *again* extended the discovery schedule at Plaintiff's request. Specifically, the Court ordered the City to submit a letter identifying witnesses with knowledge of the MDC's recordkeeping procedures and intake on the night of the alleged rape. The Court also extended the deadline for the conclusion **[*11]** of fact discovery by thirty days from the submission of the government's letter to allow for the deposition of those witnesses and other witnesses. (*See* Doc. No. 96.)

On May 16, 2016, Defendants submitted a letter identifying the corrections officers working at the MDC at the time of the alleged incident. (Doc. No. 97.) On June 22, 2016, Defendants submitted a pre-motion letter regarding their contemplated post-discovery

motions (Doc. No. 100), and Plaintiff submitted an additional letter requesting discovery sanctions (Doc. No. 101). Plaintiff's sanctions letter stated that, during a June 9, 2016 deposition of one of the witnesses disclosed by the City in its May 16 letter, Plaintiff learned the identity of several corrections officers who may have witnessed the alleged incident, including Captain Marchese, who was assigned to the intake area on the night of Plaintiff's alleged rape. (*Id.*) Remarkably, Plaintiff did not request an extension of the discovery deadline or seek leave to depose any of the recently identified corrections officers, nor did he ask for permission to amend his complaint to add any of them as defendants; instead, Plaintiff merely requested sanctions to be levied **[*12]** against Defendants. (*Id.*)

On July 14, 2016, the Court denied Plaintiff's request for sanctions in light of Plaintiffs ability to seek less drastic remedies, including "leave to amend his complaint or depose" the recently-identified witnesses. (Doc. No. 112.) The Court also set a briefing schedule for Defendants' contemplated motion for summary judgment. (*Id.*) Notwithstanding the Court's admonition, Plaintiff did not request leave to depose any of the recently-identified corrections officers or to amend his complaint; instead, he merely filed a motion for reconsideration of the Court's July 14, 2016 Order denying his request for sanctions. (Doc. No. 113.) On August 1, 2016, the Court denied Plaintiffs request for reconsideration, again noting Plaintiffs ability to request leave to amend his complaint or to depose the newly-identified witnesses. (Doc. No. 115). Inexplicably, Plaintiff made no such request in the weeks that followed.

On August 15, 2016, Defendants submitted their motion for summary judgment arguing, among other things, that Plaintiff "ha[d] not named any individual defendants to his failure to protect claim" and "ha[d] failed to adduce evidence in discovery to support any **[*13]** of his claims against the City or against ... Officer Marcos Martinez." (Doc. No. 120 at 1.) Plaintiff's opposition to the motion for summary judgment, which he filed on September 14, 2016, largely conceded the lack of evidence supporting his claims, but blamed the City for that deficiency. (*See* Doc. No. 129 at 1-11, 18-22.) As part of his opposition, Plaintiff belatedly asked the Court to: (1) reopen discovery; (2) order depositions of the corrections officers identified in the City's May 16, 2016 letter; (3) order the City to identify inmates who were housed with Plaintiff and allow Plaintiff to serve them with deposition subpoenas; (4) order the City to respond to Plaintiff's *Monell* discovery requests; and (5) permit Plaintiff to file a fifth amended complaint naming additional corrections officers as Defendants despite the expiration of the statute of limitations. (*See Id.* at 23-24.)

On November 16, 2016, the Court issued an Order denying the City's motion for summary judgment without prejudice to renewal. (Doc. No. 134.) Noting that Plaintiff's delay in requesting additional time for depositions of the corrections officers identified in the June 9, 2016 deposition was inexcusable in light **[*14]** of the Court's July 14, 2016 and August 1, 2016 orders, the Court nonetheless reopened discovery through January 17, 2017 for the limited purpose of allowing Plaintiff to depose those officers and identify and depose the inmates who had been housed with Plaintiff at the MDC. (*Id.* at 4-5.) The Court, however, denied Plaintiffs request to order the City to produce *Monell* discovery and directed Plaintiff to indicate by January 23, 2017 whether he intended to move for leave to amend his complaint and if so to attach a proposed amended complaint in compliance with the Court's Individual Rule 2.A. (*Id.* at 5.)

On January 23, 2017, Plaintiff filed a letter seeking leave to file a fifth amended complaint naming Captain Marchese as a Defendant. (Doc. No. 140.) On January 26, 2017, the Court denied Plaintiff's request because the claims Plaintiff sought leave to assert against Captain Marchese were now barred by the applicable statutes of limitations. (Doc. No. 143.) The Court found that the claims did not relate back because Plaintiff failed to diligently pursue his claims against Captain Marchese, whose photo had been produced to Plaintiff by March 16, 2016 [2] (*see* Doc. No. 79 at 3, 5; Doc. No. 101 at 3 n.l; **[*15]** *see also* Doc. No. 143 at 5 n.l) and whose name was provided to Plaintiff by June 9, 2016 at the latest, over a month before the expiration of the statute of limitations for Plaintiff's *Section 1983* claim (Doc. No. 143 at 5).

Defendants filed the instant motion for summary judgment on March 8, 2017. (Doc. No. 149.) On April 10, 2017, Plaintiff filed his opposition brief, much of which takes issue with the Court's January 26, 2017

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[2] In keeping with the spirit of *Valentin v. Dinkins, 121 F.3d 72, 76 (2d Cir. 1997)*, the City provided Plaintiff with copies of Marchese's photo and those of other officers who were on duty at the MDC on the night of July 10, 2013, and asked Plaintiff to identify any officers whom he regarded as those who ignored his reports of assault. (Doc. No. 79 at 3, 5.) Plaintiff did not identify Marchese's photo — or any others. (*See* Doc. No. 101 at 3 n.l.)

denial of his request to file a fifth amended complaint and reads more like a motion for reconsideration than an opposition to summary judgment. (Doc. No. 161.) On April 13, 2017, Defendants filed a pre-motion letter requesting that the Court strike paragraphs 185 through 270 of Plaintiff's 56.1 Counter statement, which relate to Plaintiffs de facto motion for reconsideration of the Court's January 26, 2017 Order, and strike declarations from Drs. Stephen Snyder, Plaintiff's psychiatrist, and Harold N. Bornstein, an internist. (Doc. No. 164.) Plaintiff filed a letter in response on April 18, 2017 (Doc. No. 168), whereupon the Court deemed the motion to strike made and fully submitted (Doc. No. 169). The motion for summary judgment was fully briefed by April 24, 2017. **[*16]** (Doc. No. 172.)

II. MOTION FOR RECONSIDERATION

Because — as noted above — a large portion of Plaintiffs opposition amounts to a de facto motion for reconsideration of the Court's January 26, 2017 Order, which would effectively moot Defendants' motion for summary judgment, the Court will address those arguments first before turning to Defendants' motion to strike and for summary judgment. For the reasons set forth below, the motion for reconsideration is denied.

The Federal Rules of Civil Procedure provide different standards for reconsideration of different types of orders and judgments. For a "final judgment, order, or proceeding," for instance, Rule 60 allows reconsideration in limited circumstances only. *See* Fed. R. Civ. P. 60(b). For non-final orders, on the other hand, Rule 54(b) allows for reconsideration in the district court's equitable discretion. *See* Fed. R. Civ. P. 54(b) (stating that non-final judgments "may be revised at any time before the entry of a [final judgment]"); United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982) ("[S]o long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so.") (quoting United States v. Jerry, 487 F.2d 600, 605 (3d Cir. 1973)).

Here, because the Court's January 26, 2017 Order was not a final **[*17]** order, Rule 54(b) and its equitable standard applies. Under that standard, a court must be mindful that "'where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003) (quoting Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964)). As such, a motion for reconsideration should be denied unless there is a strong likelihood that the district court's decision would ultimately be reversed on appeal. In that situation, reconsideration saves the parties' (and the Circuit's) time by avoiding a second, unnecessary battle in the Court of Appeals. A strong likelihood of reversal exists, and thus reconsideration should be granted, where there is "an intervening change of controlling law,... new evidence, or [a] need to correct a clear error or prevent manifest injustice." Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 108 (2d Cir. 2013) (quoting Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)). A party can generally establish clear error or manifest injustice by "point[ing] to controlling decisions or data that the court overlooked." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995).

As an initial matter, Plaintiff's motion for reconsideration is untimely. The Court denied Plaintiff's request for leave to amend on January 26, 2017, and Plaintiff filed his opposition to Defendants' motion for summary judgment on April 10, 2017. **[*18]** Plaintiff's motion for reconsideration thus comes seventy-four days after the Court's initial order, far exceeding the fourteen-day time limit imposed by Local Civil Rule 6.3.

Moreover, Plaintiffs motion for reconsideration fails to set forth any controlling decisions or data that the Court overlooked in its January 26 Order. Plaintiff concedes that the Court applied the correct legal standard and that "Hogan v. Fischer, 738 F.3d 509, 518-19 (2d Cir. 2013) ... provides relevant precedent"; he merely disagrees with the Court's conclusion. (Opp'n at 9.) Relying on *Hogan* and Byrd v. Abate, 964 F. Supp. 140 (S.D.N.Y. 1997) — both of which involved a plaintiff who requested leave to amend in order to assert time-barred claims against John Doe defendants — Plaintiff fails to grasp the obvious difference between those cases and his own. Put simply, Plaintiff — unlike the plaintiffs in *Hogan* and *Byrd* — was aware of the identity of the John Doe Defendant (Marchese) *before* the statute of limitations expired. *See* Hogan, 738 F.3d at 519-20 (noting that plaintiff had not identified the John Doe defendant and remanding with instructions to permit plaintiff to amend "if he succeeds in doing so"); Byrd, 964 F. Supp. at 146 ("Byrd's counsel requested that information prior to the end of the limitations period, but Corporation Counsel did not comply until after the limitations period **[*19]** had run."). Therefore, this is not a case in which the City "eliminate[d] claims against [a] John Doe defendant ... by resisting discovery requests

until the statute of limitations has ended." *Byrd, 964 F. Supp. at 146*. Rather, Plaintiffs claims against Marchese lapsed because of Plaintiffs own failure to diligently pursue discovery and timely amend his complaint.

Nowhere in the many pages Plaintiff dedicates to his motion for reconsideration does he contest the fact that he was aware of Marchese's identity by June 9, 2016 (at the latest) or explain why he should be given leave to amend at this late stage despite that fact. Indeed, Plaintiffs own 56.1 Counterstatement confirms that he was made aware of Marchese's identity during the June 9, 2016 deposition of Terrence Graham. (Pl. 56.1 ¶¶ 238, 242.) And while Plaintiff appears to argue that another deponent indicated on June 8, 2016 that three captains (including Marchese) were assigned on the night of Plaintiffs alleged rape (*see id.* ¶¶ 229, 233; Opp'n at 11), Plaintiff fails to explain why he did not request a deposition of the three captains until *after* Defendants filed their first motion for summary judgment. Inexplicably, instead of addressing these issues **[*20]** at the time he learned of Captain Marchese's identity, Plaintiff focused his efforts on a request for sanctions against the City, even though the Court repeatedly reminded Plaintiff's counsel that he could seek leave to amend his complaint or depose Marchese and the recently identified witnesses. Because Plaintiff deliberately sat on his hands for months — even though Marchese was specifically identified by name on June 9, 2016, over a month before the statute of limitations expired on Plaintiff's *Section 1983* claim — Plaintiff cannot reasonably claim that the Court erred in denying his request for leave to amend.

Put simply, Plaintiff has not demonstrated that the Court overlooked controlling law or facts, that the Court's January 26, 2017 Order contained clear error, or that the enforcement of the statute of limitations would result in manifest injustice to Plaintiff, who had knowledge of Marchese's identity and was encouraged to amend his pleadings before the statute of limitations expired. Accordingly, Plaintiff's motion for reconsideration is denied.

III. MOTION TO STRIKE

Having denied Plaintiff's de facto motion for reconsideration, the Court also denies Defendants' motion to strike Paragraphs **[*21]** 185-270 of Plaintiffs *Rule 56.1* Counterstatement — which merely summarize the procedural history and discovery disputes relevant to Plaintiffs motion for reconsideration — as moot.

Defendants also move to strike two declarations from Drs. Snyder and Bornstein relating to injuries Plaintiff claims he sustained as a result of the alleged sexual assault. Specifically, Defendants contend that Plaintiff failed to identify these doctors as either fact or expert witnesses in his *Rule 26* disclosures. (Doc. No. 164 at 2-3.) Plaintiff counters that he identified both doctors in a July 31, 2014 letter and in response to one of Defendants' interrogatories. (Doc. No. 168 at 3.) However, because the Court has denied Plaintiff's motion for reconsideration, neither declaration is relevant since there is no timely assault claim to which the declarations pertain. Accordingly, the motion to strike the declarations is also denied as moot.

IV. MOTION FOR SUMMARY JUDGMENT

Having denied Plaintiff's de facto motion for reconsideration and Defendants' motion to strike, the Court now turns to Defendants' motion for summary judgment on Plaintiff's substantive claims.

Pursuant to *Rule 56(a) of the Federal Rules of Civil Procedure*, summary judgment should be rendered "if the movant **[*22]** shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. There is "no genuine dispute as to any material fact" where (1) the parties agree on all facts (that is, there are no disputed facts); (2) the parties disagree on some or all facts, but a reasonable fact-finder could never accept the nonmoving party's version of the facts (that is, there are no genuinely disputed facts), *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; or (3) the parties disagree on some or all facts, but even on the nonmoving party's version of the facts, the moving party would win as a matter of law (that is, none of the factual disputes are material), *see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

In determining whether a fact is genuinely disputed, a court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Weyant v. Okst, 101 F.3d 845, 854 (2d Cir. 1996)*. Nevertheless, to show a genuine dispute, the nonmoving party must provide "hard evidence," *D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998)*, "from which a reasonable inference in [its] favor may be drawn," *Binder & Binder*

PC v. Barnhart, 481 F.3d 141, 148 (2d Cir. 2007) (quoting R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir. 1997)). "Conclusory allegations, conjecture, and speculation," Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998), as well **[*23]** as the existence of a mere "scintilla of evidence in support of the [nonmoving party's] position," Anderson, 477 U.S. at 252, are insufficient to create a genuinely disputed fact. A moving party is "entitled to judgment as a matter of law" on an issue if (1) it bears the burden of proof on the issue and the undisputed facts meet that burden; or (2) the nonmoving party bears the burden of proof on the issue and the moving party "'show[s]' — that is, point[s] out... —that there is an absence of evidence [in the record] to support the nonmoving party's [position]." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

A. Plaintiff's Claims Against Unnamed Defendants

In the fourth amended complaint, Plaintiff brings claims for failure to protect and deliberate indifference against various unnamed John and Jane Doe Defendants. (Doc. No 70 ¶¶ 42-52.) However, as Plaintiff concedes in his opposition (Opp'n at 12; *see also* Mem. at 5-6; Reply at 3), these claims must be dismissed in light of Plaintiff's failure to amend his complaint to identify any of the John and Jane Doe Defendants, *see, e.g.*, Keesh v. Artuz, No. 97-CV-8417 (AKH), 2008 U.S. Dist. LEXIS 59217, 2008 WL 3166654, at *2 (S.D.N.Y. Aug. 6, 2008) ("Even after discovery, plaintiff has failed to identify the 'John Doe' and 'Jane Doe' defendants. Accordingly, the complaint against them must be dismissed."). Therefore, Plaintiff's **[*24]** failure to protect and deliberate indifference claims against the unnamed John and Jane Doe Defendants are dismissed.[3]

B. Plaintiff's *Monell* Claims

Plaintiff also brings municipal liability claims against the City of New York pursuant to *Monell*. In order to prevail on a *Section 1983* claim against a municipality, a plaintiff must show that a deprivation of his or her constitutional rights was caused by an official policy or custom of the municipality. Monell, 436 U.S. at 692-94. To establish the existence of such an official policy or custom, a plaintiff "must allege the existence of one of the following: (1) a formal policy which is officially endorsed by the municipality; (2) actions taken or decisions made by government officials responsible for establishing municipal policies which caused the alleged violation of the plaintiff's civil rights; (3) a practice so persistent and widespread that it constitutes a 'custom or usage' and implies the constructive knowledge of policy-making officials; or (4) a failure by official policy-makers to properly train or supervise subordinates to such an extent that it 'amounts to deliberate indifference to the rights of those with whom municipal employees will come into contact.'" Jones v. Westchester Cty. Dep't of Corr. Med. Dep't, 557 F. Supp. 2d 408, 417 (S.D.N.Y. 2008) (quoting **[*25]** Moray v. Yonkers, 924 F. Supp. 8, 12 (S.D.N.Y. 1996)).

Instead of addressing Defendants' argument that Plaintiff has failed to introduce evidence to support his *Monell* claim, Plaintiff merely offers a one-paragraph recitation of his belated request for discovery on that claim. (Opp'n at 20.) Plaintiff thus concedes that he has not put forth any evidence to create a dispute of material fact as to whether the alleged deprivations of constitutional rights at issue were caused by an official policy or custom of the City of New York. In short, Plaintiff has not provided any evidence that any City employee knew or should have known that Plaintiff was in any actual or imminent threat of harm or risk. Nor has Plaintiff offered any evidence whatsoever that the City has a policy or custom that resulted in his alleged injuries. Accordingly, Plaintiffs *Monell* claims must be dismissed.

C. Plaintiff's Excessive Force Claim

Plaintiff alleges that he was subjected to excessive force when Officer Martinez applied his handcuffs too tightly and did not loosen them after Plaintiff requested that he do so. An "excessive force claim aris[ing] in the context of an arrest or investigatory stop of a free citizen ... is most properly characterized as one invoking **[*26]** the protections of the *Fourth Amendment*." Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The inquiry is an objective one and turns on whether the officer's actions were "objectively reasonable in light of the facts and circumstances confronting them." Id. at 397. In determining whether the force used to effect a particular seizure was reasonable under the *Fourth Amendment*, courts must pay "careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. When evaluating the

[3] To the extent Plaintiff asserts a deliberate indifference claim with respect to his wrist injury, that claim must also be dismissed for the reasons set forth in section IV.C of this Opinion.

reasonableness of handcuffing, courts also consider whether: "[1] the handcuffs were unreasonably tight; [2] the defendants ignored the [plaintiffs] pleas that the handcuffs were too tight; and [3] the degree of injury to the wrists." *Lynch ex rel. Lynch v. City of Mount Vernon, 567 F. Supp. 2d 459, 468 (S.D.N.Y. 2008)* (emphasis omitted) (quoting *Esmont v. City of New York, 371 F. Supp. 2d 202, 215 (E.D.N.Y. 2005)*). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham, 490 U.S. at 396*; *see also Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015)* ("[T]he appropriate standard for a pretrial detainee's excessive force claim is solely an objective one.").

Here, in **[*27]** light of the severity of the violent acts allegedly threatened and perpetrated by Plaintiff against his wife, as well as the potential threat he posed to responding officers, there is no cause for doubt that the use of handcuffs on the night of July 8, 2013 was reasonable. As noted above, A.K. had reported earlier that day that she had a verbal dispute with Plaintiff in which he had threatened to kill her; she also indicated that she feared for her safety because Plaintiff had access to guns and had previously hit and choked her. (Def. 56.1 ¶¶ 3-4; Pl.. 56.1 ¶ 3.) A.K. also reported that Plaintiff had become "crazy" and "violent," and that his threats had become more severe after he started abusing Adderall. (Def. 56.1 ¶ 4; Pl.. 56. ¶ 14.) A gun license search conducted by the police also indicated that Plaintiff had a number of firearms registered to him. (Def. 56.1 ¶ 5; Pl. 56.1 ¶ 5). The Court therefore finds that no juror could conclude that it was unreasonable for Officer Martinez to place Plaintiff in handcuffs.

Even though the decision to use handcuffs was fully justified under the circumstances, it is still possible that the handcuffs were applied in an excessively forceful **[*28]** manner. This, in fact, is Plaintiff's principal argument — that Officer Martinez's use of force was unreasonable because the handcuffs were too tight, that they caused Plaintiff's right wrist to bleed, and that Officer Martinez did not loosen them even after Plaintiff requested that he do so. But Plaintiff has not offered any evidence to suggest that the cut to his wrist was anything more than a superficial abrasion. *See, e.g., Matthews v. City of New York, 889 F. Supp. 2d 418, 443 (E.D.N.Y. 2012)* ("Plaintiffs should be aware that in order to withstand summary judgment, they must provide medical evidence that the handcuffs caused serious, long-lasting, or persistent injury."); *Bratton v. N.Y. State Div. of Parole,, No. 05-cv-950, 2008 U.S. Dist. LEXIS 30250, 2008 WL 1766744, at *10 (N.D.N.Y. Apr. 14, 2008)* (granting summary judgment where the "minor nature of the injury noted by the jail infirmary nurse and the complete lack of other medical evidence warrant[ed] summary judgment").

Accordingly, the superficial cut to Plaintiff's wrist does not give rise to an excessive force claim.

In fact, the only evidence offered in support of any injury beyond the superficial cut described above comes in the form of a lengthy letter from Dr. S. Steven Yang chronicling Plaintiff's ongoing struggle with an injury to his right wrist that he **[*29]** originally sustained on March 12, 2006 during a boating accident. (Doc. No. 162-7 at 2.) According to Dr. Yang, Plaintiff was diagnosed with a scapholunate ligament rupture with scapholunate diastasis, among other things, and Dr. Yang recommended exploratory surgery followed by six to eight weeks of immobilization and occupational therapy. (*Id.* at 2-3.) Plaintiff had surgery on May *2*, 2006, but continued reporting severe pain. (*Id.* at 3.) Plaintiff re-injured the same wrist in a fall in the bathroom in September 2006, which "clearly damaged his surgical ligamentous repair" and resulted in "wide separation and gapping between the scaphoid and the lunate." (*Id.* at 5.) Although urged to have another operation to avoid further degeneration, Plaintiff declined, opting instead for surgical arthroscopy of his wrist, even though he was advised that his decision to avoid surgery may give rise to the need for "a salvage procedure" in the future. (*Id.*) Plaintiff confirmed during his deposition that that he had three operations to repair his wrist (Kaplan Dep. 28:3-6) and that the operations were not successful (*id.* 28:20, 29:3).

While Dr. Yang's letter goes on to describe a visit by Plaintiff on July 19, 2013 — ten days **[*30]** after Plaintiffs arrest and handcuffing — Dr. Yang acknowledges "that [Plaintiff] had been experiencing over the past three years some gradual worsening of his right wrist pain and stiffness." (Doc. No. 162-7 at 5.) Indeed, Dr. Yang's letter basically describes the same injury and prognosis that he had diagnosed months earlier: separation between the scaphoid and the lunate and a likely need for corrective surgery.

But even if Dr. Yang's letter *could* be construed to suggest that Plaintiff's injury had worsened since his last surgery, Plaintiff still fails to establish a causal relationship between the wrist injury and the handcuffing by Martinez. Significantly, Dr. Yang's letter does not

indicate that Plaintiff's injury was attributable to the handcuffing as opposed to the "gradual worsening" that Plaintiff "had been experiencing over the past three years" or the fact that Plaintiff got into an altercation in the cell block following his arrest in which he struck someone with the previously-injured hand. (*Id.*) This failure to isolate or quantify the injury caused by the allegedly tight handcuffing is fatal to Plaintiffs excessive force claim. *See*, e.g., **[*31]** *Prescott v. Riker Island Med. Staff, No. 09-cv-255 (SAS), 2011 U.S. Dist. LEXIS 40057, 2011 WL 1435218, at *6 (S.D.N.Y. Apr. 12, 2011)* ("While recovery for aggravation of a pre-existing condition is not precluded in such a case, recovery remains available only for injuries caused by the use of excessive force.") (quoting *Brown v. Busch, 954 F. Supp. 588, 595 (W.D.N.Y. 1997)*). In this regard, Plaintiffs case is distinguishable from the cases he cites in his brief. *See, e.g., Gonzalez v. City of New York, No. 98-cv-3084 (ILG), 2000 U.S. Dist. LEXIS 5230, 2000 WL 516682, at *2 (E.D.N.Y. Mar. 7, 2000)* (denying summary judgment where plaintiff provided an affidavit from a doctor indicating that "[a]s a result of the blunt trauma and the excessively tight handcuff, Mr. Gonzalez sustained serious injuries including posttraumatic right radial nerve palsy ... tear of the tendon of the right index finger ... chronic pain syndrome, [and] post-traumatic right wrist arthropathy . . .."); *Golio v. City of White Plains, 459 F. Supp. 2d 259, 265 (S.D.N.Y. 2006)* (denying a motion to dismiss where plaintiff, himself a medical doctor and surgeon, alleged that he suffered damage to his wrist and hand nerves as a result of tight handcuffing and was unable to operate with his injured hand).

For all these reasons, the Court finds that Plaintiff has failed to establish a genuine issue of material fact with respect to his claim of excessive force by Officer Martinez. Accordingly, Defendants' motion for summary judgment **[*32]** on Plaintiff's excessive force claim is granted.

D. Plaintiff's State Law Claims

In addition to his *Section 1983* claims, Plaintiff also brings claims under state law for negligence, conversion, and assault and battery. Having dismissed the federal claims in this action, the Court declines to exercise supplemental jurisdiction over Plaintiffs state law claims. Of course, there is no dispute that the Court has discretion to exercise supplemental jurisdiction over the state law claims, which are sufficiently closely related to the *Section 1983* claims as to form part of the same case or controversy, *28 U.S.C. § 1367(a)*. Nevertheless, a court may decline to exercise supplemental jurisdiction where the "court has dismissed all claims over which it has original jurisdiction." *Id. § 1367(c)(3)*. In deciding whether to exercise supplemental jurisdiction in such a case, the court "balances the traditional 'values of judicial economy, convenience, fairness, and comity.'" *Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006)* (quoting *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims." *Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305 (2d Cir. 2003)* (quoting *Cohill, 484 U.S. at 350 n.7*); *see also Baylis v. Marriott Corp., 843 F.2d 658, 665 (2d Cir. 1988)* ("When all bases for federal jurisdiction have been **[*33]** eliminated ..., the federal court should ordinarily dismiss the state claims.").

Here, Plaintiff's federal law claims were eliminated before trial, "prior to the investment of significant judicial resources," and the Court "can discern no extraordinary inconvenience or inequity occasioned by permitting the [state law] claims to be refiled in state court." *Kolari, 455 F.3d at 123*. Accordingly, since the Court has dismissed the claims over which it has original jurisdiction, and this case presents no extraordinary circumstances or federal policy concerns that might warrant retaining jurisdiction over the state law claims, the Court declines to exercise supplemental jurisdiction and dismisses Plaintiff's state law claims without prejudice.

V. CONCLUSION

For the reasons set forth above, Plaintiff's de facto motion for reconsideration is DENIED, Defendants' motion for summary judgment is GRANTED with prejudice as to Plaintiffs federal claims and without prejudice as to Plaintiff's state law claims, and Defendants' motion to strike is DENIED as moot.

The Clerk of Court is respectfully directed to terminate the motion pending at document number 149 and to close this case.

SO ORDERED.

/s/ Richard J. Sullivan

RICHARD J. **[*34]** SULLIVAN

United States District Judge

Dated: March 22, 2018

New York, New York

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Leavey v. Int'l Bhd. of Teamsters-Theatrical Teamsters Local Union No. 817

United States District Court for the Southern District of New York

October 5, 2015, Decided; October 5, 2015, Filed

No. 13-cv-0705 (NSR)

Reporter
2015 U.S. Dist. LEXIS 135509 *; 204 L.R.R.M. 3420

THOMAS LEAVEY, Plaintiff, -against- INTERNATIONAL BROTHERHOOD OF TEAMSTERS — THEATRICAL TEAMSTERS LOCAL UNION No. 817, and THOMAS J. O'DONNELL, Defendant.

Counsel: [*1] For Thomas Leavey, Plaintiff: William David Frumkin, LEAD ATTORNEY, Frumkin & Hunter LLP (White Plain), White Plains, NY; Elizabeth Evelyn Hunter, Frumkin & Hunter LLP, White Plains, NY.

International Brotherhood of Teamsters - Theatrical Teamsters Local Union No. 817, Thomas J. O'Donnell, Defendants: Cristina Elvira Gallo, William Anspach, Friedman & Wolf, New York, NY.

Judges: NELSON S. ROMÁN, United States District Judge.

Opinion by: NELSON S. ROMÁN

Opinion

OPINION & ORDER

NELSON S. ROMAN, United States District Judge

Plaintiff Thomas Leavey, a member of the International Brotherhood of Teamsters — Theatrical Teamsters Local Union No. 817 ("Local 817" or the "Union"), initiated the instant action against Local 817 and Thomas J. O'Donnell ("O'Donnell," together with Local 817 or the Union, "Defendants") for refusing to provide access to documents and information in violation of the Labor Management Reporting and Disclosure Act ("LMRDA"), *29 U.S.C. §§ 414*, *431(c)*, and *440*; breach of the duty of fair representation in discriminating against Plaintiff in job referrals and in refusing to provide Plaintiff with job referral information, pursuant to *Section 8* of the National Labor Relations Act ("NLRA"), *29 U.S.C. § 158*, and *Section 301(a)* of the Labor-Management Relations Act, 1947 **[*2]** ("LMRA"), *29 U.S.C. § 158(a)*; and for discrimination in job referrals in retaliation for exercising his free speech rights, pursuant to the LMRDA, *29 U.S.C. § 411 et seq.*

Before the Court is Defendants' motion for summary judgment. For the following reasons, Defendants' motion is GRANTED in part and DENIED in pait.

BACKGROUND

The following facts, unless otherwise noted, are based on the undisputed facts in this matter or support Plaintiff's version of events.

Plaintiff is and has been a member of Local 817 since 1974. (Pl.'s 56.1 ¶ 1.) O'Donnell has been the president of Local 817 since approximately January 2012 and was previously the Secretary Treasurer of Local 817 from 1990 to 2012. (*Id.* ¶ 2.) Local 817 is a labor organization as defined in Section 2(5) of the NLRA, *29 U.S.C. § 152(5)*. (*Id.* ¶ 3.) The Union is the exclusive collective bargaining agent for various captains, drivers, helpers, special equipment drivers, and warehousemen working in the motion picture, television, commercial, video, live event, theater, and concert hall industries. (*Id.* ¶ 4.) Plaintiff has worked as a captain, driver, and helper, among other things, since he began shaping with the Union in 1966. (*Id.* ¶ 59.) He first began working as a captain in the 1980s. (*Id.* ¶ 60.)

I. Union's [*3] Process for Referral and Captain Selection

Local 817 refers drivers, helpers, loaders, and other labor to employment through its hiring hall. (Pl.'s 56.1 ¶ 6.) The Union also refers captains to employment on television and film jobs; however, those referrals are not made through the Union's hiring hall. (*Id.* ¶ 7.) Captains

are responsible for managing transportation on a production; working with producers to ensure a production's transportation, staffing, and driving needs are handled efficiently and cost-effectively; and supervising the set. (*Id.* ¶ 8.) A captain also enforces the terms of a collective bargaining agreement ("CBA") on a particular job to which the captain is assigned. (*Id.* ¶ 9.)

The Majors' Agreement is a CBA covering 23 major studios. (*Id.* ¶¶ 15-16, 113.) The Majors' Agreement does not cover every production, and, even to the extent it does cover a production, there are sometimes modifications. (*Id.* ¶ 15.) While there may be certain accommodations to the Majors' Agreement, O'Donnell does not put them in writing. (*Id.* ¶¶ 17-18.)

Article 3-A of the Majors' Agreement governs the selection of captains. (*Id.* ¶ 33.) When requested by a company, the Union submits the names of **[*4]** five available captains. (*Id.*) From there, the Company narrows down the list to three captains and thereafter the Union makes the final designation. (*Id.* ¶ 33.) This process is referred to as the "list of five." (*Id.* ¶ 34.) Captains not selected from a list of five are typically considered for the next production to the extent they are still available. (*Id.* ¶ 36.) In certain instances, a producer will request a captain by name, or O'Donnell recommends captains that are available and he feels are suited to the job. (*Id.* ¶ 33.) O'Donnell testified that he takes into account the demands of a given job, an employer's preferences, and the relative experience of captains; however, there is no written criteria governing how O'Donnell should select the initial list of five names. (*Id.* ¶ 37.) Additionally, O'Donnell considers his own interactions with the captain, feedback from prior employers, feedback from executive board members, and feedback from other captains in the selection process. (*Id.* ¶ 39.) O'Donnell does not track how he applies these factors. (*Id.* ¶ 40.) Often, the captain selection process is conducted over the phone, and O'Donnell does not keep notes or records of those calls. **[*5]** (*Id.* ¶ 35.) O'Donnell typically does not employ the list of five process for low budget films, and, in the event there are no available captains to create a list of five, O'Donnell may need to create a captain. (*Id.* ¶ 34.) On certain occasions, O'Donnell discusses producer feedback with captains, including negative feedback. (*Id.* ¶ 43.)

II. Plaintiff's Selection as Captain

Even in instances where management or producers have indicated they did not wish to work with Plaintiff, O'Donnell still has placed Plaintiff's name on the list of five. (Pl.'s 56.1 ¶ 45.) O'Donnell explained he does this when the industry is busy or when he attempts to talk a producer into giving Plaintiff a second chance. (*Id.* ¶ 45.)

In Plaintiff's opinion, he believed that the Union blacklisted him by slandering his reputation. (*Id.* ¶ 41.) He also testified that producers crossed his name off the list for potential captain positions so as not to "alienate" O'Donnell. (*Id.* ¶ 42.) Plaintiff was also told by O'Donnell that he was a "Class B captain." (*Id.* ¶ 48.)

Plaintiff experienced a decline in captain work beginning in October 2011. (*Id.* ¶ 48.) From 2006 to 2010, Plaintiff was ranked in the middle of the list of captains **[*6]** with regard to annual earnings; however, Plaintiff has ranked second-to-last from 2011 to the present. (*Id.*) From October 2011 to the present, Plaintiff has earned approximately $150,000 to $200,000 less than similarly situated captains. (*Id.*) Additionally, while Plaintiff worked approximately 149 days as a captain in 2011 (*id.* ¶ 63), he only worked 70 days as a captain in 2012 (*id.* ¶ 66) and 100 days as a captain in 2013. (*Id.* ¶ 68.) Plaintiff earned $186,500 in 2011 (*id.* ¶ 65), $154,000 in 2012 (*id.* ¶ 67), and $180,000 in 2013. (*Id.* ¶ 69.)

Plaintiff has received positive feedback from producers on various jobs, including his performance on the sets of "Premium Rush" and "Public Morals." (*Id.* ¶ 49.) In certain instances, Plaintiff was requested by producers to be a captain. (*Id.* ¶ 49.)

O'Donnell has had in-person and phone conversations with Plaintiff to discuss Plaintiff's complaints regarding the referral system and has never refused to meet with Plaintiff. Those meetings typically have occurred once a year over the past 10 years. (*Id.* ¶ 56.) During those meetings, Plaintiff told O'Donnell that senior captains should be offered work; however, O'Donnell told Plaintiff that producers **[*7]** have the right to refuse whomever they want. (*Id.* ¶ 57.)

III. Plaintiff's Alleged Free Speech

Plaintiff points to several instances in which he exercised his "free speech" rights. First, Plaintiff sets forth evidence regarding a series of incidents in which Plaintiff's support for certain individuals allegedly detracted from his ability to obtain captain work. It is undisputed that Mickey Fennell wanted to become a captain. (Pl.'s 56.1 ¶ 89.) Plaintiff was open regarding his support for Fennell to become a captain, and he

believed he shared this support with Union officers. (*Id.* ¶ 90.) Plaintiff also supported Henry Boyle, whom Plaintiff testified lost work because he was outspoken regarding Union issues. (*Id.* ¶¶ 91, 93.) The Union did not object to Plaintiff's requests that Boyle work on jobs at which Plaintiff was the captain. (*Id.* ¶ 92.) The Union was aware of Plaintiff's support for Boyle as Plaintiff continued to request Boyle on his jobs. (*Id.* ¶ 94.) Plaintiff also supported John Brady in his attempts to become a member of the Union. (*Id.* ¶ 96.) Plaintiff offered to testify on Brady's behalf in Brady's lawsuit against the Union, but did not explicitly tell the Union he supported **[*8]** Brady's lawsuit. (*Id.*) However, Plaintiff believes that Union officers learned of Plaintiff's support for Brady through the "grapevine." (*Id.*)

Second, Plaintiff vocalized a series of grievances to union members or union officials. In 1995, Plaintiff lodged a complaint regarding the length of time it took for Maurice Fitzgerald to be appointed to a certain captain job, specifically that Fitzgerald was referred ahead of Plaintiff. (*Id.* ¶ 102.) In 2008, Plaintiff and other individuals working on the set of "30 Rock" sent a petition to the Union objecting to a trade of the Election Day holiday with the day following Thanksgiving Day. (*Id.* ¶ 99.) During a Union meeting, Plaintiff spoke out about this trade. (*Id.*) In November 2010, Plaintiff complained to O'Donnell regarding the working conditions on the set of "Premium Rush." (*Id.* ¶ 97.) In particular, Plaintiff felt the producers were sending him a message by providing him a small, noisy, crowded, and unsecure working space. (*Id.*)

Third, Plaintiff sent O'Donnell (and in one instance, O'Donnell and the Union's executive board) several correspondence regarding complaints with respect to union activity. In June 2002, Plaintiff sent a letter **[*9]** to O'Donnell and the Union executive board regarding the appointment of Whalen over Plaintiff for a particular captain job. (*Id.* ¶ 103.) Plaintiff claimed he should have received the job because he was senior to Whalen. (*Id.*) In July 2005, Plaintiff sent a letter to O'Donnell stating that Plaintiff was being blacklisted by the Union in that his name was excluded from the captains list. (*Id.* ¶ 104.) In June 2012, Plaintiff sent O'Donnell a letter complaining that he was denied work and stating that he was being bypassed for jobs. (*Id.* ¶ 106.) The letter purported to file a grievance "against all Hollywood and Independent Producers of Films, Motion Picture and Television shows and Productions" on behalf of "all Teamster Captains." (Anspach Decl., Ex. B at Ex. 16.) Later that same month, the Union responded to Plaintiff's letter requesting more specificity with regard to Plaintiff's grievance. (Pl.'s 56.1 ¶ 109.) Plaintiff subsequently sent a letter to O'Donnell in July 2012 outlining certain categories of documents he sought to pursue his grievance. (Anspach Decl., Ex. B at Ex. 18.) The Union did not respond to that letter. (Pl.'s 56.1 ¶ 121.)

Additionally, Plaintiff made inquiries about **[*10]** and complaints regarding the retirement fund and scholarship fund. (*Id.* ¶ 126.) Plaintiff also lodged general, unspecified complaints regarding the assignment of captain work. (*Id.* ¶ 122.) Plaintiff is a member of Teamsters for a Democratic Union ("TDU"). (*Id.* ¶ 85.) Plaintiff believes he told O'Donnell that he was a member of TDU but could not recall the specifics of when he told O'Donnell. (*Id.* ¶ 86.)

IV. Plaintiff's Requests for Documents and Information

Any individual working on a job is entitled to have a copy of the operative CBA upon request. (Pl.'s 56.1 ¶ 111.) O'Donnell typically does not make copies of the contract available until they are fully executed. (*Id.*) Plaintiff has requested the operative CBA on multiple occasions, and Plaintiff did not receive a copy of the CBA on every occasion. (*Id.* ¶ 33.) According to O'Donnell, in certain instances Plaintiff did not receive a copy of the CBA because it was universal and Plaintiff already had a copy. (*Id.*)

The Union renegotiated the Majors' Agreement in 2013. (*Id.* ¶ 113.) During an October 2013 membership meeting, the proposed changes were read out to Union members, and Plaintiff requested a copy of the renegotiated agreement. **[*11]** (*Id.*) Plaintiff abstained from voting on the proposed changes because he was not afforded an opportunity to see the proposed changes in writing. (*Id.*) Plaintiff requested a copy of the CBA for "London Calling" (aka Spiderman) in March 2013. (*Id.* ¶ 114.) O'Donnell told Plaintiff that since Spiderman was covered by the Majors' Agreement and since Plaintiff possessed the Major's Agreement, he already had the relevant contract for Spiderman. (*Id.*) There is no evidence that Plaintiff received a copy of the CBA for "A Further Gesture." (*Id.* ¶ 115.)

Union members also are entitled to a copy of the Union's constitution and bylaws upon request. (*Id.* ¶ 116.) In February 2012, the Union membership approved amendments to the constitution and bylaws. (*Id.*) During the February 2012 meeting, members were told that they would receive a copy of the new

constitution and bylaws once the changes were approved by the International Brotherhood of Teamsters ("IBT"). (*Id.*) Plaintiff received a copy of the amended constitution and bylaws in or around December 2013 (following approval by IBT) (*id.* ¶ 118), and he received a copy of the previous constitution and bylaws on July 17, 2013. (*Id.* ¶ 117.)

In connection **[*12]** with his June 2012 grievance, Plaintiff requested copies of all documents pertaining to Plaintiff's work, all producer requests for captains, all captain jobs since January 1, 2012, copies of referrals to production companies, copies of the list of captains, including their seniority and number of days worked in 2012, copies of the records of captain earnings, and copies of the "shape hall rules" for captains. (*Id.* ¶ 119.)

STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of pointing to evidence in the record, "including depositions, documents [and] affidavits or declarations," *id.* at 56(c)(1)(A), "which it believes demonstrate[s] the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party may also support an assertion that there is no genuine dispute by "showing . . . that [the] adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). If the moving party fulfills its preliminary burden, the onus shifts to the non-moving party to identify "specific facts showing **[*13]** that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (internal citation and quotation marks omitted). A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248; *accord* Benn v. Kissane, 510 F. App'x 34, 36 (2d Cir. 2013) (summary order). Courts must "constru[e] the evidence in the light most favorable to the non-moving party and draw[ ] all reasonable inferences in its favor." Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 720 (2d Cir. 2010) (internal quotation marks omitted). In reviewing the record, "the judge's function is not himself to weigh the evidence and determine the truth of the matter," nor is it to determine a witness's credibility. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial." Id. at 250.

Summary judgment should be granted when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The party asserting that a fact is genuinely disputed must support their assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c)(1). "Statements that are **[*14]** devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." Bickerstaff v. Vassar Coll., 196 F.3d 435, 452 (2d Cir. 1999). The nonmoving party "may not rely on conclusory allegations or unsubstantiated speculation." FDIC v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010) (internal citation and quotation marks omitted). Moreover, "[a non-moving party's] self-serving statement, without direct or circumstantial evidence to support the charge, is insufficient to defeat a motion for summary judgment." Fincher v. Depository Trust & Clearing Corp., No. 06 Cv. 9959 (WHP), 2008 U.S. Dist. LEXIS 70046, 2008 WL 4308126, at *3 (S.D.N.Y. Sept. 17, 2008) aff'd, 604 F.3d 712 (2d Cir. 2010) (citing Gonzalez v. Beth Isr. Med. Ctr., 262 F. Supp. 2d 342, 353 (S.D.N.Y. 2003)).

DISCUSSION

I. LMRDA Sections 104 and 201 Claims

Section 104 of the LMRDA provides that "[i]t shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement . . . ." 29 U.S.C. § 414. Section 201 further requires that a union make available to its members a copy of its constitution and bylaws. 29 U.S.C. § 431(a), (c).

Defendants contend that Plaintiff's LMRDA claims regarding requests for documents and information are meritless because, among other things: **[*15]** (1) Local 817's policy is to provide copies of CBAs to the union

members working under those agreements; (2) Plaintiff was provided access to three CBAs, specifically, the Majors' Agreement, "A Further Gesture" CBA, and the "Spiderman" CBA; (3) the newly renegotiated Majors' Agreement was not executed at the time Plaintiff requested that agreement; (4) Plaintiff was provided access to Local 817's new constitution and bylaws once those documents were approved by the International Brotherhood of Teamsters; and (5) the June 2012 request for information was not made in good faith. (Defs.' Mem. at 21-24.)

Plaintiff counters that, among other things: (1) Defendants refused to provide Plaintiff with CBAs for certain jobs he was working on; (2) Defendants "do not maintain any records of requests for contracts or when contracts are provided"; (3) despite his receipt of the new constitution and bylaws upon their approval after the advent of this litigation, Plaintiff did not receive a copy of the existing constitution and bylaws; (4) Plaintiff's June 2012 request for information was intended to help Plaintiff "better understand the captain referral process and how he was treated"; and (5) even **[*16]** if the June 2012 request was "illegitimate," Defendants were nevertheless required to turn over the information. (Pl.'s Opp. at 8-11.)

O'Donnell acknowledged that "it's the right of any member" to receive a copy of the CBA governing a particular job; however, Local 817 does not track members' requests for copies of contracts. (Hunter Aff., Ex. B at 112:5-7.) He further testified that Plaintiff requested copies of CBAs "[o]n multiple occasions" and received copies of the contracts "several times." (*Id.* at 112:13-16.) O'Donnell recalled two occasions on which Plaintiff did not receive copies of the CBA (*id.* at 113:17-21): (1) O'Donnell told Plaintiff that he already had a copy of the governing contract since "it's universal," and (2) O'Donnell told Plaintiff that, in keeping with the Union's practice, he would receive a copy of the CBA once the Union had a copy of "the fully executed agreement." (*Id.* at 112:15-113:2.) Plaintiff, on the other hand, testified that he "had trouble getting contracts." (Hunter Aff., Ex. A at 17:6-7.) Plaintiff further testified that he did not receive the 2013 Majors' Agreement, nor did he receive the CBAs governing "A Further Gesture" or "Spiderman." (*Id.* at **[*17]** 141:2-144:16.)

At the summary judgment stage, the Court's function is not to weigh the evidence, but simply to inquire whether there remain disputed material facts such that there is the need for a trial. *See Anderson, 477 U.S. at 249-50*. Here, Defendants cannot definitively establish that Plaintiff did *not* receive copies of the requested CBAs. Because the Court must examine the evidence in the light most favorable to Plaintiff as the non-moving party and draw all reasonable inferences in his favor, the Court ultimately finds that Plaintiff has sufficiently pointed to genuine fact disputes material to the question of whether he received copies of requested CBAs so as to render summary judgment on this issue inappropriate.

With respect to Plaintiff's receipt of the Union's constitution and bylaws, Defendants assert that Plaintiff in fact received a copy of the amended bylaws in or around December 2013. (Hunter Aff., Ex. B at 118:23-120:8.) Indeed, minutes of the Union's December 21, 2013 General Membership Meeting indisputably indicate that Plaintiff was in attendance at that meeting during which "[c]opies of the Local Union By-Laws that were recently updated were distributed to the members." (Anspach Decl., Ex. P.) Plaintiff **[*18]** nevertheless contends that he should have received a copy of the preexisting constitution and bylaws prior to IBT's approval of the new constitution and bylaws. (Hunter Aff., Ex. A at 146:15-20) ("[I]f we were working under the bylaws, whatever bylaws we were working under at that time, if the new ones weren't approved, apparently we were still working under bylaws and that's the one I should have been sent."). Plaintiff admits that he did not go to the union hall to request a copy of the preexisting constitution and bylaws, explaining that he would "have to cross the George Washington Bridge, the Triboro Bridge" to do so. (*Id.* at 146:25-147:2.) In any event, Plaintiff received a copy of the preexisting constitution and bylaws on July 17, 2013 (Hunter Aff., Ex. K.)

As Defendants point out, Plaintiff's complaint clearly is based upon the allegation that he did not receive a copy of the amended constitution and bylaws. (Compl. ¶ 27.) The Court agrees with Defendants that Plaintiff's argument that he did not receive the preexisting constitution and bylaws "is a post hoc attempt to survive summary judgment." (Defs.' Reply at 9.) In light of the evidence that Plaintiff received a copy of the **[*19]** amended constitution and bylaws, the Court grants Defendants' summary judgment motion with respect to Plaintiff's LMRDA Section 201 claim. *See Summerville v. Local 77, 369 F. Supp. 2d 648, 658-59 (M.D.N.C.) aff'd, 142 F. App'x 762 (4th Cir. 2005)* (holding Plaintiff's LMRDA claim has "no legal validity" where "it is uncontested that all of the documents and information Plaintiff requested . . . were in fact produced.").

II. LMRDA Section 101(a)(2) Claim

Plaintiff alleges that Defendants discriminated against him in job referrals in retaliation to Plaintiff's exercise of his free speech rights in violation of the LMRDA. Section 101(a)(2) of the LMRDA provides that "[e]very member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, argument, or opinions; and to express at meetings of the labor organization his views . . . ." 29 U.S.C. § 411(a)(2). "Section 101(a)(2) protects union members from direct interference with union membership rights in retaliation for their expression of opinions concerning union activities." Maddalone v. Local 17, United Bhd. of Carpenters & Joiners of Am., 152 F.3d 178, 183 (2d Cir. 1998) (citing Cotter v. Owens, 753 F.2d 223, 228 (2d Cir. 1985)). A claim under Section 101(a)(2) of the LMRDA may be premised upon discrimination in referrals to employment. *See* Maddalone, 152 F.3d at 184-85; *see also* Murphy v. Int'l Union of Operating Engineers, Local 18, 774 F.2d 114, 123 (6th Cir. 1985) (determining plaintiff's LMRDA claims to be actionable where alleged discrimination concerned the "manipulat[ion] [of] a work referral system"). To successfully state a claim for retaliation in violation of the LMRDA, a plaintiff **[*20]** must establish the following: "(1) his conduct constituted 'free speech' under the LMRDA; (2) that the speech was a cause for the Union taking action against him; and (3) damages." Commer v. McEntee, No. 00-cv-7913 RWS, 2006 U.S. Dist. LEXIS 82395, 2006 WL 3262494, at *10 (S.D.N.Y. Nov. 9, 2006) (citations omitted).

Plaintiff points to the following instances of purported "free speech" that he claims prompted Defendants' retaliation vis-à-vis Plaintiff's decline in captain work: (1) a June 3, 2002 letter from Plaintiff addressed to O'Donnell and the Union executive board regarding his lack of captain work and the "unfair" system for assigning captain work (Anspach Decl., Ex. B at Ex. 11); (2) a July 28, 2005 letter from Plaintiff addressed to O'Donnell regarding Plaintiff's exclusion from a captains list (*id.* at Ex. 13); (3) a June 4, 2012 letter from Plaintiff to O'Donnell purporting to file a grievance "against all Hollywood and Independent Producers of Films, Motion Picture and Television shows and Productions" on behalf of "all Teamster Captains" (*id.* at Ex. 16); (4) a July 31, 2012 letter from Plaintiff to O'Donnell explaining a request for certain categories of documents to pursue his grievance outlined in **[*21]** the June 4 letter (*id.* at Ex. 18); (5) Plaintiff's circulation in 2008 of a petition regarding the swap of the Election Day holiday (*id.* at Ex. 15); (6) Plaintiff's inquiries and complaints regarding the retirement fund and scholarship fund (Pl.'s 56.1 ¶ 126); (7) a November 2010 verbal complaint to O'Donnell regarding working conditions on the "Premium Rush" job (*id.* ¶¶ 97-98); (8) Plaintiff's abstention from a membership vote on changes to the Majors' Agreement at an October 2013 union membership meeting (*id.* ¶ 113); (9) unspecified complaints on behalf of all captains regarding assignment of captain work (*id.* ¶ 122); (10) Plaintiff's support of Henry Boyle (*Id.* ¶ 122); (11) Plaintiff's 1995 complaint regarding Maurice Fitzgerald's receipt of work before other captains with more experience (*id.* ¶ 102); (12) Plaintiff's support for Mickey Fennell in his attempt to become a captain (*id.* ¶¶ 88-90); and (13) Plaintiff's support for John Brady to become a member of the Union (Pl. 56.1 ¶ 96). (Pl.'s Opp. at 12-13.)

Courts in this jurisdiction are clear that free speech within the meaning of the LMDRA is speech made "in the context of the union democratic process, i.e. political speech ***[*22]*** *primarily addressed to other union members*, rather than free speech at large." Helmer v. Briody, 759 F. Supp. 170, 176 (S.D.N.Y. 1991) (emphasis added); *see also* Monaco v. Smith, No. 00-cv-5845 (RMB), 2004 U.S. Dist. LEXIS 1334, 2004 WL 203009, at *9 (S.D.N.Y. Feb. 2, 2004); Kazolias v. IBEW LU 363, No. 09-cv-7222 (RO), 2013 U.S. Dist. LEXIS 92100, 2013 WL 3682926, at *8 (S.D.N.Y. July 1, 2013). In *Helmer*, the court granted defendants' motion for summary judgment with respect to plaintiff's LMRDA retaliation claim. Id. at 171. The court concluded that plaintiff failed to present evidence "that he ever voiced his belief in the corruption of the [union's] leaders to his fellow members." 759 F. Supp. at 177. Similarly, in *Kazolias*, the court held that plaintiffs' speech was not protected by the LMRDA because plaintiffs neither "alleged [nor] demonstrated that their complaints or the content therein were in any way communicated to union members." 2013 U.S. Dist. LEXIS 92100, 2013 WL 3682926, at *8. Finally, in *Monaco*, the court granted defendants' motion for summary judgment on plaintiff's LMRDA retaliation claim because "[p]laintiff's statement directed solely to his supervisor is not the type of speech that Title I of the LMRDA was designed to protect." 2004 U.S. Dist. LEXIS 1334, 2004 WL 203009, at *9.

Under this framework, it is clear that Plaintiff's letters to O'Donnell (or O'Donnell and the executive board) do not constitute "free speech." Plaintiff has failed to present any evidence that his complaints, letters, and grievances, **[*23]** or the substance thereof, were communicated to other union members. Moreover,

neither case Plaintiff relies upon for the proposition that speech regarding the job referral system is categorically free speech is binding upon this court. *See* Kelsey v. IATSE, 294 F. Supp. 1368 (E.D. Pa. 1968), *aff'd sub nom.* Kelsey v. Philadelphia Local No. 8 of Int'l Alliance of Theatrical Stage Emp. & Moving Picture Mach. Operators of U.S. & Canada, 419 F.2d 491 (3d Cir. 1969) *and United Bhd. of Carpenters,* Local 522, 269 N.L.R.B. 574 (N.L.R.B. 1984).[1] Having determined that Plaintiff's June 3, 2002; July 28, 2005; June 4, 2012; and July 31, 2012 letters do not qualify as "free speech" under the LMRDA, the court need not analyze the remaining two factors with respect to those letters.

The Court turns next to the second factor—whether the union member's speech was a cause for the union taking action against him. Causation is established by demonstrating a "direct nexus between the union's action and the member's exercise of his § 411 rights." Mayes v. Local 106, Int'l Union of Operating Engineers, No. 86-cv-41, 1995 U.S. Dist. LEXIS 1669, 1995 WL 30576, at *21 (N.D.N.Y. Jan. 20, 1995) **[*24]** *aff'd sub nom. Mayes v. Jones, 99 F.3d 402 (2d Cir. 1995)*. "[C]onclusory remark[s] cannot support the demonstration of a causal connection." Ponticelli v. Zurich Am. Ins. Grp., 16 F. Supp. 2d 414, 436-37 (S.D.N.Y. 1998). Moreover, "the absence of selective prosecution or dissimilar treatment defeats a claim of retaliation under the LMRDA." Hussein v. Hotel Emps. & Rest. Union, Local 6, 108 F. Supp. 2d 360, 367 (S.D.N.Y. 2000) *vacated on other grounds* 14 Fed. Appx. 39 (2d Cir. 2001) (citing Ricks v. Simons, 759 F. Supp. 918, 924 (D.D.C. 1991)).

Defendants advance a series of arguments attacking any purported connection between Plaintiff's speech and his receipt of captain jobs: (1) the Union had no knowledge of most of Plaintiff's speech; (2) the record is devoid of evidence of animus on the Union's part; and (3) there was a substantial time gap between Plaintiff's speech and the purported decline in his receipt of captain jobs. (Defs.' Mot. at 6-8.) While there are certainly large gaps in time between certain of Plaintiff's proffered examples of free speech (i.e., Plaintiff's circulation of a petition in June 2008 or his 1995 complaint regarding Maurice Fitzgerald) and when he claims he began to see a decline in his captain work, which tends to support Defendants' argument that no nexus exists, Plaintiff rightfully points out that temporal proximity is merely one means of establishing a connection between speech and the Union's action. (Pl.'s Opp. at 18) **[*25]** (citing Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990)).

More fatal to Plaintiff's Section 101(a)(2) claim, however, is the fact that Plaintiff simply has failed to proffer any evidence tending to establish that his speech caused the alleged decline in Plaintiff's captain jobs. Plaintiff argues that beginning in late 2010 through 2011, he began to engage in more protected activity; specifically, his November 2010 complaint to O'Donnell regarding "Premium Rush," his support of Henry Boyle, and his support of John Brady. (Pl.'s Opp. at 16.) Plaintiff points to a subsequent decline in his earnings from 2011 to 2012 as evidence of retaliation for that activity. (*Id.* at 16-17). However, Plaintiff's 2013 earnings were nearly the same as his 2011 earnings. (Pl.'s 56.1 ¶¶ 65, 69.) Plaintiff testified that he complained to O'Donnell about the insufficient working conditions on the set of "Premium Rush." (Anspach Decl., Ex. A at 99:22-100:20.) Plaintiff later confirmed that he did not experience those conditions on subsequent jobs (Anspach Decl., Ex. A at 101:8-13) and that O'Donnell intervened to prevent producers on "Premium Rush" from firing Plaintiff's cocaptain. (Anspach Decl., Ex. A at 103:18-104:3.) With respect to the Boyle incident, Plaintiff testified that **[*26]** he called Boyle after Boyle got in a "shouting match" with O'Donnell's father; however, Plaintiff admitted that he never told any union officer that he supported Boyle. (Anspach Decl., Ex. A at 105:8-106:4.) Additionally, O'Donnell testified that he was not aware that Plaintiff supported or assisted Boyle. (Anspach Decl., Ex. B at 153:9-15.) Finally, Plaintiff testified that John Brady complained about missing meal money (Anspach Decl., Ex. A at 169:5-15); however, Plaintiff has failed to adduce any evidence that he engaged in any protected "free speech" with regard to Brady's complaint. To conclude that these isolated incidents, even considered together, prompted retaliation would require the Court to make an illogical leap.

Plaintiff's own testimony is equally unavailing. In support of his claim that he was being discriminated against, Plaintiff testified that he "*believe[d]* that the discrimination *could have been* very likely that [producers] were pleasing [O'Donnell] in not accepting [Plaintiff]" for captain work. (Anspach Decl., Ex. B at

[1] In any event, Plaintiff misreads *Kelsey*. In *Kelsey*, the court held that speech is protected where it "concern[s] a matter of interest to the members of the union," which is consistent with the law in this district. 294 F. Supp. 1368 at 1375. The court there did not create a bright line rule that speech regarding the union referral process is necessarily protected free speech.

117:4-6) (emphasis added). When pressed for proof on this point, Plaintiff pointed to the fact that he wasn't working. (*Id.* at 117:8-9.) With regard to his **[*27]** claim that he was blacklisted by the Union, Plaintiff testified that, "*[i]n [his] opinion* people that are talking about my name and my job ability when they haven't met me, I believe that is to be slandered . . . ." (*Id.* at 179:21-24) (emphasis added). A party's own suppositions that he is being discriminated against, when lacking evidentiary support, are insufficient to withstand summary judgment.

Defendants, on the other hand, have set forth evidence demonstrating that Plaintiff's decline in captain work is attributable to Plaintiff's own poor reputation. (Defs.' Mot. at 16.) In particular, Defendants point to the affidavits of producers who have worked with Plaintiff.[2] In his affidavit, M. Blair Breard declared that his experience working with Plaintiff on a feature film was "so negative" that he "strike[s] his name" "whenever his name is on the list of available Captains for a project on which I'm working . . . ." (Bread Aff. ¶ 3.) Scott Ferguson, a producer of studio and independent film and television productions, similarly stated in his affidavit that he "would not contemplate doing another job with [Plaintiff] as [his] captain" since Plaintiff "fall[s] short" with respect to essential captain skills. **[*28]** (Ferguson Aff. ¶¶ 3-6.) In his affidavit, Sean Fogel, an assistant unit production manager in the film industry, stated that he did not select Plaintiff as captain when presented with his name on a list of available captains. (Fogel ¶ 2.) Celia Roque, a producer and production manager in the movie industry, declared that she does not choose Plaintiff as captain when his name appears on the list of five because there are "better choices for captains." (Roque Aff. ¶ 8.) Mari Jo Winkler-Ioffreda, an executive producer in the move industry who worked with Plaintiff on the set of "Premium Rush," stated in her affidavit that she had been "reluctant" to select Plaintiff as captain due to his "bad reputation among producers" but O'Donnell "urged [her] to give him a chance." (Winkler-Ioffreda Aff. ¶ 3.) She further stated that she found Plaintiff's "communication skills and his organizational skills less than satisfactory" (*id.* ¶ 5) and has subsequently declined to work with Planitiff. (*Id.* ¶ 12.)

There is absolutely no basis on the evidence before this Court to conclude that Defendants retaliated against Plaintiff **[*30]** vis-à-vis the referral of captain work. Rather, the record reflects that, to the extent Plaintiff experienced a decline in captain work, it was due to his own reputation. And, in any event, Plaintiff's 2013 earnings were nearly the same as his 2011 earnings, which cuts against Plaintiff's argument that he received less work due to his exercise of his free speech rights. Accordingly, the Court grants Defendants' motion for summary judgment with respect to Plaintiff's LMRDA Section 101(a)(2) claim.

III. Duty of Fair Representation Claims

Plaintiff's second and third claims relate to alleged breaches of the duty of fair representation ("DFR"). In particular, Plaintiff alleges that Defendants acted arbitrarily and capriciously in denying him job referrals (second claim) and that Defendants denied him access to requested job referral information (third claim). (Pl.'s Opp. at 9, 21.) A union certified under the NLRA owes to its members a duty of fair representation. *Kazolias v. IBEW LU 363, No. 09-cv-7222 RO LMS, 2012 U.S. Dist. LEXIS 183443, 2012 WL 6641533, at *9-10 (S.D.N.Y. Dec. 11, 2012) report and recommendation adopted in part*, *No. 09-cv-7222 RO, 2013 U.S. Dist. LEXIS 92100, 2013 WL 3682926 (S.D.N.Y. July 1, 2013)* (citing *Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)*). "A union breaches its duty of fair representation if its actions 'can fairly be characterized as so **[*31]** far outside a "wide range of

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[2] Plaintiff contends that affidavits of previously unnamed producers should not be considered by this Court pursuant to *Rule 37 of the Federal Rules of Civil Procedure*. (Pl.'s Mot. at 5.) *Rule 37* provides that "[i]f a party fails to provide information or identify **[*29]** a witness as required by ***Rule 26(a)*** or ***(e)***, the party is not allowed to use that information or witness to supply evidence on a motion . . . unless the failure was substantially justified or is harmless." *Fed. R. Civ. P. 37(c)(1)*. A party has a responsibility to supplement its Rule 26 disclosure only "when the omitted or after-acquired information 'has not otherwise been made known to the other parties during the discovery process.'" *Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720, 727 (S.D.N.Y. 2011) aff'd in part, vacated in part sub nom. Marvel Characters, Inc. v. Kirby, 726 F.3d 119 (2d Cir. 2013)* (quoting 8A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2049.1 (3d ed. 2010)). Though Defendants did not disclose the exact identity of the producers, they did, as Plaintiff acknowledges, disclose "various producers" in their initial disclosures. (Pl.'s Mot. at 5.) Plaintiff was aware of the identity of the producers through previously produced documents and deposition testimony. More to the point, Plaintiff was aware that these producers, as Plaintiff's former employers, were in a position to speak to Plaintiff's performance. As such, the Court will consider the affidavits of the producers in support of Defendants' motion.

reasonableness" . . . that [they are] wholly "arbitrary, discriminatory, or in bad faith."'" Spellacy v. Airline Pilots Ass'n-Int'l, 156 F.3d 120, 126 (2d Cir. 1998) (quoting Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991) (quotations omitted)). Review of union activity for an alleged DFR breach "'must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.'" Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100, 1106 (2d Cir. 1991) (quoting O'Neill, 499 U.S. at 66).

A. Claim Regarding Job Referrals

Plaintiff alleges that Defendants breached their DFR by discriminating against him with respect to job referrals. A union member may assert a DFR claim based upon a union's "wrongful refusal to refer him for work." Kazolias, 2012 U.S. Dist. LEXIS 183443, 2012 WL 6641533, at *9-10 (citing Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 82, 110 S. Ct. 424, 107 L. Ed. 2d 388 (1989)). To successfully assert a DFR claim, a plaintiff must establish: (1) the union acted in an arbitrary or discriminatory manner, or in bad faith and (2) a "causal connection between the union's wrongful conduct and their injuries." Spellacy, 156 F.3d at 126. Bad faith is evidenced by an "improper intent, purpose, or motive" and "encompasses fraud, dishonesty, and other intentionally misleading conduct." *Id.*[3]

[3] The statute of limitations for a DFR claim is six months. *See* Eatz v. Local Union No. 3 of I.B.E.W., 794 F.2d 29, 33 (2d Cir. 1986). Plaintiff asserts that the six month time period should be tolled due to delayed discovery or the continuing violation doctrines. **[*32]** (Pl.'s Opp. at 25.) That very argument, however, was rejected by the court in *Kazolias*, and this Court agrees that neither doctrine is applicable to DFR claims. *See* Kazolias, 2012 U.S. Dist. LEXIS 183443, 2012 WL 6641533, at *12; *see also* Phelan v. Local 305 of United Ass'n of Journeymen, and Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canda, 973 F.2d 1050, 1060 (2d Cir. 1992). A DFR claim accrues when Plaintiff reasonably could become aware that he was being retaliated against with respect to referrals. Kazolias, 2012 U.S. Dist. LEXIS 183443, 2012 WL 6641533, at *12. Here, Plaintiff argues that he noticed a decline in captain work beginning in October 2011. (Pl.'s 56.1 ¶ 48.) Therefore, only those alleged discriminatory referrals which occurred after July 31, 2012 (six months prior to Plaintiff's filing of his suit on January 31, 2013) would be considered in evaluating whether Defendants breached their DFR. *See* Mayes v. Local 106, Int'l Union of Operating Engineers, No. 86-cv-41, 1993 U.S. Dist. LEXIS 15142, 1993 WL 435665, at *9 (N.D.N.Y. Oct. 12, 1993).

For the same reasons set forth in Section II, *supra*, Plaintiff has failed to proffer sufficient evidence that the Union acted in an arbitrary or discriminatory manner, or in bad faith, in its operation of the referral system. While "[f]ailure to follow objective standards in assessing worker qualifications for specialty referrals may constitution a breach of a union's duty of fair representation," mere "conjecture" that a Union is not operating its referral system objectively "does not constitute **[*33]** substantial evidence." N.L.R.B. v. Local 46, Metallic Lathers Union & Reinforcing Iron Workers of New York & Vicinity of the Int'l Ass'n of Structural & Ornamental Iron Workers, 149 F.3d 93, 106 (2d Cir. 1998). Therefore, the Court grants Defendants' motion for summary judgment with respect to Plaintiff's DFR job referral claim.

B. Claim Regarding Job Referral Information

Plaintiff's next DFR claim is premised upon Defendants' alleged failure to provide him with requested job referral information, in violation of Section 8 of the NLRA, *29 U.S.C. § 158(b)*, and Section 301 of the LMRA. (Pl.'s Opp. at 9.) "A union breaches its duty of fair representation in violation of *section 8(b)(1)(A) of the NLRA* when it arbitrarily denies a member's request for job referral information, when that request is reasonably directed towards ascertaining whether the member has been fairly treated with respect to obtaining job referrals." NLRB v. Carpenters Local 608, United Bhd. of Carpenters & Joiners of Am., AFL-CIO, 811 F.2d 149, 152 (2d Cir. 1987). Courts are clear that so long as a union member's request for information is "made in *good faith,"* the union must furnish its member with the requested information and may not refuse the request "based on its own determination that the grievance underlying the request is non-meritorious or that the information sought is not essential." Local 608, 811 F.2d at 152-53. Moreover, the request need not be motivated solely by a member's belief that he/she is being treated unfairly by the union. Id. at 152.

Here, Plaintiff's request for information was made pursuant to a grievance **[*34]** letter Plaintiff sent to members of the Union's executive board dated June 4, 2012, which stated that Plaintiff was "denied work as a Teamster Captain to less experienced workers, without cause, over the last six months" (the "June 2012 Request"). (Anspach Decl., Ex. B at Ex. 16.) Defendants

contend that Plaintiff failed to demonstrate a good faith basis for the June 2012 Request because it was not aimed at establishing whether the Union treated him fairly in captain referrals; rather, he sought, through a "fishing expedition," evidence to bolster a lawsuit against movie and television producers. (Defs.' Mot. at 23-24.) Defendants further argue that Plaintiff's request for information was unreasonable because the Union informed Plaintiff that he was receiving less captain work due to a poor reputation among producers, and Plaintiff's belief that he was being discriminated against was "pure conjecture." (*Id.* at 24.) Finally, Defendants assert that Plaintiff's request for information was overbroad and burdensome based upon the volume of documents Plaintiff sought, Plaintiff's knowledge that certain documents were not maintained by the Union, the irrelevance of certain documents to his discrimination **[*35]** complaint, and Plaintiff's knowledge that he was not entitled to certain information and/or it did not exist. (*Id.*)

Plaintiff maintains that his request was motivated by a desire "to better understand the captain referral process and how he was treated" and that he was entitled to investigate for himself the cause of the decline in his captain work in lieu of relying upon the Union's explanation. (Pl.'s Opp. at 10.) Plaintiff testified that the June 2012 Request was premised upon O'Donnell's practice to "bypass" Plaintiff for "less experienced captains on jobs" and his observation that other captains were receiving more work than Plaintiff. (Anspach Decl., Ex. A at 153:21-154:2.) Upon O'Donnell's written request of June 27, 2012 that plaintiff provide more specificity to his grievance that he was "unfairly denied work as a transportation captain," (Anspach Decl., Ex. B at Ex. 17) Plaintiff responded by letter on July 31, 2015, outlining categories of certain documents he required to pursue his grievance. (Anspach Decl., Ex. B at Ex. 18.) Plaintiff requested, among other things, copies of producers' requests for captains, electronic or written communications concerning Plaintiff's work, **[*36]** and a list of the captains and their seniority. (Anspach Decl., Ex. B at Ex. 18.) It is undisputed that Defendants did not respond to Plaintiff's July 31, 2015 letter or provide Plaintiff with any of the information he requested. (Pl.'s 56.1 109.) Because there is evidence from which a reasonable juror could conclude that the June 2012 Request was made in good faith, the Court need not determine whether Plaintiff had additional motivations in his request for information beyond whether he was being treated unfairly by the union. Moreover, Defendants are not permitted to deny Plaintiff's request for information based upon their determination that Plaintiff's request was unreasonable. Accordingly, this Court denies Defendants' motion for summary judgment with respect to Plaintiff's DFR job referral information claim.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED with respect to Plaintiff's claims under LMRDA Sections 201 and *101(a)(2)* and DENIED with respect to Plaintiff's claim under LMRDA Section 104. The Court additionally GRANTS summary judgment on Plaintiff's claim that Defendants breached their duty of fair representation in their operation of the job referral system and DENIES **[*37]** summary judgment on Plaintiff's claim that Defendants breached their duty of fair representation with respect to the provision of job referral information.

The Court respectfully directs the Clerk to terminate the motion at ECF No. 15. The parties are directed to appear for a pretrial conference on November 23, 2015 at 10:30 AM.

Dated: October 5, 2015

White Plains, New Yark

SO ORDERED:

/s/ Nelson S. Román

NELSON S. ROMÁN

United States District Judge

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Smith v. American Federation of Musicians

United States District Court for the Southern District of New York.

May 4, 1972.

No. 68 CIV 2937.

Reporter
1972 U.S. Dist. LEXIS 13898 *; 80 L.R.R.M. 3063; 68 Lab. Cas. (CCH) P12,681

Daniel Smith, Plaintiff v. American Federation of Musicians of United States and Canada, Defendant.

Opinion by: [*1] TENNEY

Opinion

Memorandum

TENNEY, J.: This suit, brought under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), *29 U.S.C. §§ 411*, *412* and *529 (1970)*, challenges two appellate decisions of the American Federation of Musicians (the "Federation"). The first of these decisions was rendered on plaintiff's appeal from a denial by the Bridgeport Musicians' Association, Local 63 ("Local 63") of plaintiff's claim of illegal discharge against his employer, the Shakespeare Festival Theatre ("Festival Theatre"). The second appellant decision remitted from $200.00 to $100.00 a fine imposed by Local 63 upon plaintiff for "bypassing Local 63, A.F. of M. and usurping its authority on a matter involving an engagement in its jurisdiction covered by a master agreement negotiated by said local. (Art. II of Constitution - The object of this association is . . . the enforcement of good faith and fair dealings)." [1] When plaintiff refused to pay the fine, he was expelled from the Federation on June 13, 1968. [2] Plaintiff sues herein for reinstatement to membership (First Cause of Action); damages for illegal discharge, i.e. requiring the Federation to correct its award to uphold **[*2]** the claim against Festival Theatre (Second Cause of Action) and against the Federation for breaching its contract with plaintiff as embodied in its "bylaws and regulations" (Third Cause of Action). The Federation moves herein for summary judgment dismissing the complaint pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. [3] Since the gravamen of plaintiff's complaint centers primarily on the actions of Local 63 rather than on the subsequent appellate review of such actions by the International Executive Board of the Federation, a discussion of such actions is necessary. [4]

[*3] Plaintiff, a member of Local 802 of the Federation for eleven years, received a letter, dated February 8, 1967, from Festival Theatre confirming his "engagement as clarinet-E Flat clarinet-bass clarinet, Shakespeare Festival Theatre, Stratford, Connecticut. Current season opening February 28, 1967, through September 10th. . . . Local 63 A.F. of M. Bridgeport, Connecticut . . .

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[1] Appellate Record before International Executive Board of the Federation at 10 (Exhibit 1 to affidavit of Stanley Ballard verified June 16, 1971 in support of instant motion - hereinafter "Ballard Affid.").

[2] Ballard Affid. 19.

[3] Plaintiff has not cross-moved for summary judgment or for interlocutory relief. His counsel has been content to submit a statement of "genuine issues" under Rule 9(g) of the General Rules of this court which consists of conclusions and argument and is neither "short" nor "concise". No attempt has been made by plaintiff's counsel to comply with Rule 9(b) of said General Rules which requires the filing of an answering memorandum "setting forth the points and authorities relied upon in opposition".

[4] Local 63 is unfortunately not a party defendant, although this is not fatal to plaintiff. Heretofore defendant moved under *Rule 12(b) (7) of the Federal Rules of Civil Procedure* for an order dismissing the complaint for failure to join Local 63 as an indispensable party. In an opinion dated December 31, 1968 the late Judge Herlands directed the joinder of Local 63 as a party defendant. However, he noted that plaintiff could obtain complete relief against the Federation without the joinder of the Local. *Smith v. American Fed'n of Musicians , 46 F.R.D. 24, 26 (S.D.N.Y. 1968)*. After Local 63 had been joined, it successfully moved for dismissal against it as a joined party

notified of your engagement and approved. No transfer is required." [5] At that time there was in effect a collective bargaining agreement dated March 21, 1967 between Festival Theatre and Local 63 "for the personal services of Musicians" for the period from January 1, 1967 through December 31, 1968. [6] Provision was made therein for the employment of Federation members other than members of Local 63 "if Management decides that no local man is satisfactory for the job" but only "after duly notifying and consulting Local 63" (Paragraph 5). Paragraph 16 of said contract provided "that either the management or any contracted Musician may terminate employment upon two (2) weeks written notice." However, under the "Additional Terms and Conditions" of the contract it was further provided that "to the extent permitted **[*4]** by applicable law, there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder (insofar as they do not conflict with those of the Federation), and the employer acknowledges his responsibility to be fully acquainted, now and for the duration of this contract, with the contents thereof." [7] It is not disputed that Article 6, Section 14 of the By-laws of Local 63 provides in part that "Any musician employed in a theatre after two weeks shall stay for the season's engagement. This is to apply to a season's engagement only." [8] The confirmation letter to plaintiff dated February 8, 1967 makes no reference to any contract between Festival Theatre and Local 63 or to the by-laws of Local 63, and would appear to be for a "season's engagement". Plaintiff's professional services allegedly having been unsatisfactory, Festival Theatre by letter dated April 22, 1967 discharged him more than two weeks after commencement of his employment, giving him two weeks notice "effective . . . April 22, 1967 and ending **[*5]** performance, May 6th 1967." [9] No reason for the discharge is set forth in this letter although Article 6, Section 14 of the Local By-Laws allegedly requires that "the true and exact reason for such discharge must also be given." [10] Thereafter by letter from Local 63 dated May 9, 1967 addressed to plaintiff at his home in Flushing, N.Y., he was summoned to appear before the Local's Executive Board on May 23, 1967 in Bridgeport, Connecticut "to answere charges preferred against . . . him." The nature of the "charges" was not disclosed. [11] By letter dated May 16, 1967 plaintiff responded to the Local 63 communication pointing out that Article 7, Section 1 of the Federation by-laws provided that "a member must be notified in writing of the charges against him" and that under Section 3 of that Article "if a member has left the jurisdiction where he is charged with having committed a violation, he must be given an opportunity to forward his testimony in writing." [12] Plaintiff also quoted the provisions of LMRDA establishing safeguards against improper disciplinary action. *29 U.S.C. § 411 (1970)*:

"(a)(5) No member of any labor organization may be fined, suspended, expelled, or otherwise **[*6]** disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

"(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

By letter dated May 20, 1967 [13] plaintiff was advised by Local 63 that his case would be continued until further notice and by letter dated May 23, 1967 [14] he was given a specification of the charges "preferred against him by member Ernest Christopher, Contractor, Shakespeare Festival Theatre:

* * *

"1. Failure to appear and perform rehearsals at Shakespeare Festival Theatre on April 21 and 22, 1967.

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defendant on the ground of lack of venue. *Smith v. American Fed'n of Musicians , 47 F.R.D. 152 (S.D.N.Y. 1969)*. The court permitted the action to continue against the Federation since full relief could be granted and since Local 63 could intervene if it wished to protect its interests.

[5] Ballard Affid., Exh. 1, p. 4.

[6] *Id . pp. 84-87* incl.

[7] *Id . p. 87*.

[8] The court has not been furnished with a copy of these by-laws, nor were they part of the record before the Federation.

[9] Ballard Affid., Exh. 1, p. 5.

[10] Plaintiff disputes the alleged reason for his discharge.

[11] Ballard Affid., Exh. 1, p. 6.

[12] Id . p. 7.

[13] Id . p. 9.

[14] Id . p. 10.

(Art. **[*7]** VI, Sec. 4 of By-laws - Any member accepting an engagement and failing to appear and play said engagement, shall be fined the price of the engagement, unless he has a satisfactory reason for his non-appearance.)

"2. Bypassing Local 63, A.F. of M. and usurping its authority on a matter involving an engagement in its jurisdiction covered by a master agreement negotiated by said local. (Art. II of Constitution - The object of this association is . . . the enforcement of good faith and fair dealings.)

"You may appear at the above stated time to submit your defense in person, accompanied by any witnesses pertinent thereto, or may submit your defense in writing. Failure to do one or the other will cause the case to be judged in default, and the Executive Board will proceed to a decision in the matter forthwith."

Plaintiff was also advised in this letter that a hearing would be held in Bridgeport, Connecticut on June 7, 1967.

By letter dated June 2, 1967 plaintiff sought advice from Local 63 "concerning the procedures to be followed" [15] and by a subsequent letter dated June 5, 1967 replied to the charges made against him and, among other **[*8]** things, requested a copy of the "master agreement between Local 63 and the Festival Theatre . . . and a copy of the By-Laws of Local 63." [16] He also inquired when he could expect to receive Christopher's (complainant's) "Rebuttal Statement" so that he, plaintiff, would be able to prepare his "Sur-Rebuttal".On the same date plaintiff wrote to Local 63 advising that he wished to make a claim in Local 63 against the Festival Theatre and Christopher for lost wages based on violation of plaintiff's contract. [17] Plaintiff received no response to his letters of June 2 and June 5, 1967 or any copy of the documents requested and did not appear at the "hearing" on June 7, 1967 at which Local 63's Executive Board met, and decided to (1) dismiss the charge relating to plaintiff's failure to appear at certain rehearsals; (2) fine plaintiff $200 for having "bypassed" and "usurped" the Local's "authority"; and (3) denied his claim that his discharge had been unlawful, holding that his dismissal was "legal and in order" under "Section 16 of the Master Contract between the Shakespeare Theatre and Local :63 A.F. of M." and denying his claim for money due. [18] Plaintiff, by letter dated June 21, 1967 **[*9]** replied to the decision of Local 63 noting, inter alia , that he had not been given an opportunity to defend himself, inquiring what local or Federation by-law he had been charged with violating, and reminding the Local that it had never complied with his request for a copy of the "master agreement" and the Local's by-laws. He further stated that he felt he had been deprived of his legal rights of union representation in connection with his discharge. [19] On June 26, 1967 he again requested these documents, [20] and on June 27, 1967 appealed Local 63's determination with respect to the fine and the termination of his employment to the Federation's International Executive Board, listing therein some twenty-two alleged irregularities in the handling of his case by Local 63. [21]

In an undated letter to the Federation received August 18, 1967 Christopher, the contractor for Festival Theatre, replied to plaintiff's appeal, giving his justification for the charges which he apparently had made against plaintiff. [22] The second **[*10]** paragraph of this letter is significant.

"I do wish to state first that as Contractor Shakespeare Theatre I do not take any action relative to the engagement thereof, competency thereof or give a two-weeks notice of services without first the notification and approval of Local 63. . . ." [23]

By letter dated August 20, 1967 [24] the Local also submitted certain "facts" relative to the case, to the Federation.Plaintiff responded to both letters by letter to the Federation dated September 21, 1967 [25] and further

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[15] Id . p. 12.

[16] Id . pp. 14-21 incl.

[17] Id . p. 22.

[18] *Id . p. 24*.

[19] *Id . pp. 25-28* incl.

[20] *Id . p. 29*.

[21] Id . pp. 2-3 incl.

[22] *Id . pp. 39-42* incl.

[23] *Id . p. 39*.

[24] *Id . pp. 43-45* incl.

[25] *Id . pp. 46-55* incl.

by letter dated October 9, 1967. [26]

On November 13, 1967 the President of the Federation, pursuant to Article 7, Section 8 of its By-laws, appointed Robert Crothers, Assistant to the President, A.F. of M., to serve as referee [27] and on December 1, 1967 the referee conducted a hearing at which plaintiff appeared with a fellow member and official of Local 802. [28] Also appearing were the President, the Vice-President and Secretary of Local 63, John Duffy, the Conductor and Musical Director of the Festival Theatre, and the original **[*11]** complainant Christopher. Apparently at this hearing the "master agreement" was first made available to plaintiff. There is not any question but that plaintiff was given an opportunity to be heard and present evidence and witnesses at the hearing on December 1, 1967. There are however, no minutes of the hearing. Thereafter on January 9, 1968 the referee forwarded his report to the Federation's International Executive Board in which he stated his opinion (a) that plaintiff had not sustained his appeal of the decision of Local 63 in finding him guilty of the charges but recommended that the fine be reduced from $200 to $100 and (b) recommended that plaintiff's appeal from the decision of Local 63 in denying his claim against the Shakespeare Festival Theatre be denied. [29] The Board received the various appellate documents and report on January 29, 1968 and issued an award on March 4, 1968 affirming Local 63's finding of guilt on the charge, but reducing the fine to $100 and separately affirmed the denial of plaintiff's claim against the Festival Theatre. [30] On April 17, 1968 plaintiff, through his attorney, requested the Board to reconsider its decision "on the grounds of prejudicial **[*12]** error" alleging that the Board had committed such error in: (a) affirming Local 63's imposition of a fine based upon charges which were not specifically stated and which failed to state an offense which is defined in the bylaws or constitution of the Union; and (b) affirming Local 63's denial of plaintiff's claim against the Festival Theatre, since his discharge violated Article 6, Section 14 of the Local 63 by-laws. [31] The Board adhered to its initial awards and so notified plaintiff, who was given thirty days in which to pay his reduced fine. When plaintiff failed to pay the fine he was expelled from membership in the Federation on June 13, 1968. [32]

Although the courts are reluctant to interfere with matters concerning internal union discipline, they cannot overlook the fundamental premise of the LMRDA that labor organizations should function democratically, and accordingly when it appears that union disciplinary measures lack to basic fairness and due process guaranteed by *29 U.S.C. § 411(a)(5) (1970)*, the courts **[*13]** have both jurisdiction and the duty to insure the enforcement of the "*Bill of Rights* of Members of Labor Organizations" guaranteed by *§ 411*. *Gleason v. Chain Service Restaurant , 300 F. Supp. 1241, 1250-1251 (S.D.N.Y. 1969)*, aff'd , *422 F.2d 342 (2d Cir. 1970)* (per curiam). In the instant case it is necessary to distinguish between (a) the matter of the charges made against plaintiff resulting in the imposition of a fine by the union along with his eventual loss of emmbership for failure to pay that fine, and (b) plaintiff's unsuccessful attempt to pursue through union channels his claim against his employer for wrongful discharge.

Turning first to the charges made against plaintiff and for which he was "fined", the court's inquiry must be directed to whether he was "served with written specific charges"; "given a reasonable time to prepare his defense"; and "afforded a full and fair hearing". *29 U.S.C. § 411(a)(5) (1970)*. The first notice he received did not identify the charges preferred against him, and it was only after he had pointed out the requirements of the Federation by-laws and of *29 U.S.C. § 411(a)(5) (1970)* that he was advised that the charge (for which he **[*14]** was ultimately fined) was "bypassing Local 63, A.F. of M. and usurping its authority on a matter involving an engagement in its jurisdiction covered by a master agreement negotiated by said local. (Art. II of Constitution - The object of this association is . . . the enforcement of good faith and fair dealings.)" While the court may not substitute its authority "for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members", *International Brotherhood of Boilermakers, AFL-CIO v. Hardeman , 401 U.S. 233, 242-243 (1971)*, it still must ascertain whether the charges, although proper, were also "specific". *Id . at 245*. Of course "the requisite degree of specificity required to meet the

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[26] *Id . pp. 68-71* incl.

[27] *Id . p. 73*.

[28] *Id . pp. 80-83* incl.

[29] *Id . pp. 80-83* incl.

[30] Ballard Affid. 15.

[31] Id . 17 and Exh. 3.

[32] Ballard Affid. 18 and 19.

statutory standards will, of necessity, vary from case to case. The circumstances surrounding an alleged disciplinary infraction by a union member, and the time and place as nearly as can be ascertained, constitute the minimal information that the union should disclose to the accused in order to afford him a reasonable opportunity to prepare his defense." *Gleason v. Chain Service Restaurant, supra at 1251*; see *Jacques v. Local* ***[*15]*** *1418, Int'l Longshoremen's Ass'n , 246 F. Supp. 857 (E.D. La. 1965)*, aff'd , *404 F.2d 703 (5th Cir. 1968)* (per curiam). Certainly no "circumstances" or "time" or "place" are specified in the charges on which he was found guilty. The written record, on the contrary, shows a failure on the part of the union to furnish plaintiff with any specification of the charges, with any information relative to the procedures mandated by Local 63, with a copy of the "master agreement" referred to in the charge, with a copy of the Local's by-laws, or with the names of those who would sit in judgment on him (the charges having been brought against him by Christopher, a union member). Not only is there evidence to support a charge of lack of specificity in the charge, but also of a denial of "a reasonable time to prepare his defense" and "a full and fair hearing". Nor does the possibility that plaintiff may have had actual knowledge of the specific charges validate the fine or expulsion. It is not the duty of an accused member to secure a written notice of the specific charges, but the duty of the union to give such notice. *Magelssen v. Local Union No. 518, Plasterers' Int'l Ass'n , 233 F. Supp.* ***[*16]*** *459, 461 (W.D. Mo. 1964)*. In the instant case the most that can be said is that plaintiff in his response to the charges in his letter of June 5, 1967 stated: "If management representative Christopher is claiming that my seeking advice to protect myself against his illegally dismissing me is bypassing the Local and usurping its authority, he is in effect demanding that I be denied the right to counsel". However, "an ex post facto showing that the accused had knowledge of the events surrounding the alleged offenses cannot cure the lack of adequate written notice made mandatory by the statute". *Gleason v. Chain Service Restaurant, supra at 1253*. The record before this court and before the International Executive Board on appeal indicates that the fir contained in the complainant Christopher's letter to the International Executive Board dated August 19, 1967, over two months after the decision by the Local Union. [33] This letter by the complainant is quite revealing for it indicates that the basis for the charges against plaintiff was the latter's action in threatening suit against Christopher and the Festival Theatre for wrongful discharge, for seeking assistance from his own Local **[*17]** rather than from Local 63 in connection with such discharge, and also for seeking the support of his fellow-musicians. [34] Further development of the facts in this area may show a violation of *29 U.S.C.§§ 411 (a)(2)* and *(4)* in addition to a violation of *§ 411(a)(5)*. Finally, with respect to the action of Local Board 63 on the charges against plaintiff, and also with respect to his claim for illegal discharge, it bears repeating that he was repeatedly refused a copy of the "master agreement" between Local 63 and Festival Theatre, plaintiff's employer. This was a collective bargaining agreement, plaintiff's rights as employee were allegedly "directly affected by such agreement" and he had a statutory right to receive a copy. *29 U.S.C. § 414 (1970)*. In light of the foregoing, it hardly appears necessary to further consider whether plaintiff had a full and fair hearing before Local 63. Indeed, it is not possible to do so, for there are no minutes of that "hearing" in the record. What does appear from the record is the picture of a member of one local of the Federation (i.e. Local 802) employed within the jurisdiction of another Local (Local 63) who was discharged from his employment **[*18]** contrary to the by-laws of Local 63, albeit in conformity with a collective bargaining agreement between Local 63 and his employer which he has not seen and which was illegally refused him upon his demand, who thereafter sought assistance from his own local and for which action he was summarily and generally charged, "tried" and ultimately expelled from the union.

Were Local 63 a defendant herein, further discussion would be superfluous. However, the Federation is the sole defendant. Furthermore, so far as the Court is aware, the sole direct connection that the Federation had with the foregoing sorry chronicle was with plaintiff's appeal from the actions of Local 63. The basis of possible relief against the Federation will be considered hereinafter. The question which is presently ripe for determination is whether the actions of the Federation "cured" the underlying illegal actions of Local 63. It is not clearly disputed that plaintiff received some elucidation as to the charges against him and the reasons for his discharge from employment by way of statements furnished to the Federation by his accuser, **[*19]** Christopher, and by Local 63 following the institution of his appeal. It is likewise true that plaintiff received a hearing before a referee appointed by the

[33] Ballard Affid., Exh. 1, pp. 39-42 incl.

[34] *Id . pp. 40-41*.

president of the Federation, which the court, in the absence of proof to the contrary, will assume was a full and fair hearing. Plaintiff, however, never requested such a hearing and the appointment of a referee was authorized only by the Federation by-laws under Art.7, section 6(A)(3) [35] in the case of a trial , whereas plaintiff had appealed the decision of Local 63. In the case of an appeal from a decision of a local it may be decided "only upon the evidence used in the hearing of such matter before such local, which shall be reduced to writing at such hearing and certified by the Secretary under seal of the local." Art. 8, Section 15. [36] Furthermore, if the proceedings before the International Executive Board constituted a "trial" under Art. 7, Section 6(A)(3) then plaintiff was entitled "to be notified in writing of the charges against him" under Section 1 of that Article and no such notification appears in the record. The only explanation that the court can discern for the appointment of a referee is the dual nature **[*20]** of the appeal from the decision of Local 63 dated June 6, 1967, which (a) fined plaintiff $200 for violation of Article II of said Local's Constitution, and (b) which denied plaintiff's claim for wrongful discharge. Plaintiff's claim for wrongful discharge was covered by Article 9 of the Federation's by-laws and Section 6(A)(2) of that Article provided that upon appeal from the decision of the Local in connection with the discharge of a union employee by an employer "the Board shall receive the evidence taken by . . . the local and, in its discretion, may receive additional evidence from any party." No such provision is made in connection with an appeal from disciplinary action by the union against a member. The court concludes, therefore, on the basis of the evidence presently before it that the hearing before the referee did not cure the violation of plaintiff's rights under *29 U.S.C. § 411(a)(5)*. Plaintiff had a right to a fair trial at the local level. *Gulickson v. Forest , 290 F. Supp. 457, 467 (E.D.N.Y. 1968)*. In the light of the foregoing it is clear that summary judgment for defendant is unwarranted. *Mamula v. Local 1211, United Steelworkers , 202 F. Supp. 348, 351 (W.D. **[*21]** Pa. 1962)*.

With respect to plaintiff's claim for wrongful discharge, under the Federation's by-laws he had "the right to sue or make claim through his local union or the Federation, as the case may be, against . . . any employer . . . for any amount resulting from failure to receive his salary, (or) for violation of contract." Art. 9, Section 1. Furthermore, it would appear that such initial adjudication shall be "by the person, persons or body specified by the rules, By-laws or practices of the local of said Federation in whose jurisdiction the services have been . . . performed, in accordance with the procedures adopted in such rules or By-laws or referred to under such practices". Art. 9, Sec. 6(A)(2). Since no copy of such rules or By-laws of Local 63 is before the court, it is impossible to determine whether the mandated procedures were complied with. The court merely observes **[*22]** that plaintiff's claim for wrongful discharge was dated June 5, 1967, and denied by Local 63 on June 7, 1967, and, as far as can be ascertained, on the basis of the Master Contract, a copy of which plaintiff had unsuccessfully sought to obtain. Mere failure to comply with internal procedures, however, would not bring this particular claim of plaintiff within the purview of *29 U.S.C. § 411 et seq . (1970)*. Indeed, the parties to a claim such as plaintiff's agree "that the courts of the State of New York and of the state in which any party to such submission resides shall have jurisdiction over such parties to adjudication in reference to any matter arising out of any adjudication held pursuant hereto." Art. 9, Sec. 6(C)(7). However, different considerations apply where the discharge of the union member by an employer constitutes in effect "discipline" of the member by the union within the meaning of "otherwise disciplined" in *§ 411 (a)(5)* (1970). If such discharge was instigated by the union then this court has jurisdiction and the provisions of *§§ 411 (a)(5)* and *412* apply. *Gross v. Kennedy , 183 F. Supp. 750, 754-756 (S.D.N.Y. 1960)*. See also *Figueroa v. National Maritime Union **[*23]** , 342 F.2d 400, 406 (2d Cir. 1965)*; *Detroy v. American Guild of Variety Artists , 286 F.2d 75* (2d Cir.), cert. denied , *366 U.S. 929 (1961)*. In view of the fact that plaintiff was discharged by Christopher, the contractor for Festival Theatre, apparently on the complaint of the conductor, Duffy [37] (both of whom were members of the Federation, Christopher being a member of Local 63), in apparent violation of the Local's by-laws, and further that Christopher admittedly acted after notifying and with the approval of Local 63, a trial of the issues may well show that the discharge was the act of the Local. Plaintiff also suggests the reason for his discharge was

[35] Ballard Affid., Exh. 2. The fact that the referee was the Assistant to the President of the Federation may be relevant in determining whether such hearing was a fair and full hearing. *Vars v. International Bhd. of Boilermakers , 320 F.2d 576 (2d Cir. 1963)*.

[36] Ballard Affid., Exh. 2.

[37] Plaintiff's attempt to bring charges against Duffy through Local 63 was repeatedly frustrated.

not professional incompetence but rather his failure to appear and perform at the rehearsals of April 21 and 22, 1967 (one of the two charges made against plaintiff by the Local and which charge was dropped). Since there are genuine issues as to material facts defendants' motion for summary judgment dismissing the second and third causes of action must fail. Furthermore, facts developed at trial may support the conclusion that the Federation is liable for the acts of Local 63 under the doctrine of respondeat superior or agency. **[*24]** Fulton *Lodge No. 2, Int'l Ass'n of Machinists v. Nix , 415 F.2d 212, 219-220 (5th Cir. 1969)*; *Allen v. International Alliance of Theatrical Employees , 338 F.2d 309, 318 (5th Cir. 1964)*. In any event, the matter of damages including punitive damages and any award of counsel fees should await trial. *Robins v. Schonfeld , 326 F. Supp. 525, 531 (S.D.N.Y. 1971)*; *Sands v. Abelli , 290 F. Supp. 677, 685-686 (S.D.N.Y. 1968)*; *Farowitz v. Associated Musicians, Local 802 , 241 F. Supp. 895, 909 (S.D.N.Y. 1965)*.

In view of the fact that plaintiff "stands mute" in this proceeding and seeks no affirmative relief and on the further ground that he can adequately be made whole by way of damages, the reinstatement of plaintiff to union membership sua sponte by the court will not be ordered.

Defendants' motions, however, for the reasons hereinbefore set forth are denied in toto .

So ordered.

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